S. Hrg. 98-1274

THE LEGAL FEE EQUITY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2802

A BILL TO PROVIDE FOR COMPREHENSIVE REFORMS AND TO ACHIEVE GREATER EQUITY IN THE COMPENSATION OF ATTORNEYS PURSUANT TO FEDERAL STATUTE IN CIVIL, CRIMINAL, AND ADMINISTRATIVE PROCEEDINGS IN WHICH THE UNITED STATES IS A PARTY, AND IN CIVIL PROCEEDINGS INVOLVING STATE AND LOCAL GOVERNMENTS

SEPTEMBER 11, 1984

Serial No. J-98-134

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
41-706 O WASHINGTON : 1985

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

Vinton DeVane Lide, *Chief Counsel and Staff Director*
Deborah K. Owen, *General Counsel*
Deborah Bernstein, *Chief Clerk*
Mark H. Gitenstein, *Minority Chief Counsel*

Subcommittee on the Constitution

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina
CHARLES E. GRASSLEY, Iowa

DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont

Stephen J. Markman, *Chief Counsel and Staff Director*
Randall R. Rader, *General Counsel*
Jeanne von Zastrou, *Chief Clerk*
Robert E. Feidler, *Minority Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 1, 4
DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona 14
Mathias, Charles McC., Jr., a U.S. Senator from the State of Maryland 29
Denton, Jeremiah, a U.S. Senator from the State of Alabama 29
Grassley, Charles E., a U.S. Senator from the State of Iowa 30

PROPOSED LEGISLATION

Text of S. 2802—A bill to provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil, and administrative proceedings in which the United States is a party, and in civil proceedings involving State and local governments 15

CHRONOLOGICAL LIST OF WITNESSES

Dinkins, Hon. Carol, Deputy Attorney General, U.S. Department of Justice 31
Bellotti, Hon. Francis X., attorney general, Massachusetts; Hon. Steven Clark, attorney general, Arkansas; and Hon. David L. Wilkinson, attorney general, Utah, representing the National Association of Attorneys General 234
Shepherd, John C., president, and Thomas J. Foltz, American Bar Association 356
McTeer, Charles Victor, attorney, Greenville, MS, accompanied by Nan Aron, Alliance for Justice, and Armand Derfner, attorney 376

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Bellotti, Francis X.:
    Testimony 234
    "Report to Congress—Civil Rights Attorney's Fees Awards Act of 1976" 237
Clark, Steve: Prepared statement 345
Dinkins, Carol E.:
    Testimony 31
    Prepared statement 36
    Response to Senator DeConcini's questions in letter of September 20, 1984. 138
Eikenberry, Kenneth O.:
    Prepared statement 317
    Additional statement 327
Foltz, Thomas J.:
    Testimony 360
    Prepared statement 365
Hatch, Orrin G.:
    "Reform of Civil Rights Fee Award Practices Needed" from Legal Times, February 13, 1984 147
    Memorandum—Attorney's fees award under section 1988 150
    Akron Center for Reproductive Health, Inc., et al. "Renewal of Motion for Award of Attorneys' Fees" 153
McTeer, Charles Victor:
    Testimony 376
    Prepared statement 383
Rader, Randall R.: Letter from Robert D. Evans, September 19, 1984 369
Shepherd, John C.:
    Testimony 356

Page

Shepherd, John C.—Continued
  Prepared statement 359
Stephan, Robert T., letter to the Subcommittee on the Constitution, Committee on the Judiciary, February 25, 1982 335
Zimmerman, LeRoy S.: Prepared statement 337

APPENDIX

Additional Submissions for the Record

Letters from J. Michael Dorsey to:
  Randy Rader, February 2, 1984 401
  Gordon D. Gee, November 8, 1983 402
  Donald Bogard, December 2, 1983 406
Letter from J. Anthony Snorgrass to Randall R. Rader, February 23, 1984 408
Letter from Kelly P. Finn to J. Anthony Snorgrass, July 15, 1983 409
  Mallonee, M. LE., et al., against Housing Authority of Kansas City, MO, et al.:
    Request for hearing 410
    Suggestions in opposition to plaintiffs' application for attorney's fees pursuant to 42 U.S.C. section 1988 411
Resolution Addressing Legal Aid's Request for in Excess of $18,694 for Legal/Attorney Fees From the Housing Authority 417
Letter from Florine Jones to JoAnn Raphael, November 10, 1983 418
Letter from J. Michael Dorsey to Gordon D. Gee, November 8, 1983 419
Testimony of the Risk and Insurance Management Society, Inc., submitted by Jon Harkavy 422
Statement of the Lawyers' Committee for Civil Rights Under Law Before the Subcommittee on the Constitution, concerning S. 2802, the Legal Fee Equity Act 425
Letters to Hon. John P. Shonkwiler from:
  Roy O. Gulley, July 27, 1984 449
  Harry G. Comerford, August 9, 1984 450
  Harold W. Sullivan, August 23, 1984 451
  Joseph F. Cunningham, August 3, 1984 454
  Ralph S. Pearman, July 18, 1984 457
  Howard Lee White, August 23, 1984 459
  William J. Sunderman, August 22, 1984 461
Letters to Hon. Orrin G. Hatch from:
  John P. Shonkwiler, September 12, 1984 463
    Enclosures: Section 1983. Civil action for deprivation of rights 465
  Philip S. Ward, March 19, 1984 468
"A Judge Objects to Some Unclassy Action" from Wall Street Journal, October 16, 1984 470
Letters to Orrin G. Hatch from:
  Nancy Drabble, September 21, 1984 471
  Frances Dubrowski, September 21, 1984 472
Testimony of The Washington Council of Lawyers 473
Letter from Julius LeVonne Chambers, to Senator Orrin G. Hatch, September 10, 1984 480
Bibliography on Attorney's Fees under 42 U.S.C. section 1988 483
"1984 Case Update, Civil Rights Attorney's Fees Awards Act of 1976 by Nixon Handy, Senior Assistant Attorney General, Temple of Justice AV-21, Olympia, WA 486
Letters to Hon. Orrin G. Hatch from:
  W. Ward Reynoldson, September 11, 1984 530
  Enclosures:
    Resolution V 532
    Resolution VI 533
  Russell Chapin, September 10, 1984 534
    Enclosure: "Perspectives on Current Developments" from the AEI Journal on Government and Society 535
Letter from Charles S. Rhyne, National Institute of Municipal Law Officers to Senate Judiciary Committee, Subcommittee on Constitution, November 8, 1984 540
  Enclosure: Amendments to the Civil Rights Act of 1871 and the Civil Rights Attorney's Fees Awards Act of 1976 541

Page

- Letter from Ted Cannon, Salt Lake County attorney to Senator Orrin G. Hatch, June 7, 1983 544
- Letter from Myron L. Dale to Randy Rader, September 12, 1983 546
    - Enclosure: Municipalities' civil rights and antitrust liability: May cities still govern? 547
- Letter from Marvin J. Glink to Senator Orrin G. Hatch, November 2, 1984 571
    - Enclosure: Civil rights attorneys' fees—What does a city pay for? 572
- Briefs in the U.S. Supreme Court of Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, petitioners against Alfred W. Chesny, individually and as administrator of the estate of Steven Chesny, deceased 587
- Letter from Gladys Babcock, Pennington County Commissioner, Creighton, South Dakota to Hon. Senator Larry Pressler, September 23, 1983 632
- Letter from David R. Brown to Senator Strom Thurmond, July 21, 1983 635
- Letter from Gilbert Gallegos to Senator Orrin G. Hatch, February 14, 1984 638
    - Enclosure: A bill to provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983 and 1988) relating to civil actions for the deprivation of rights 639
- Letter from Robert Ten Eyck to Randy Rader, October 28, 1983 642
    - Enclosures:
        - "Details of Jail Lawsuit Remain," by Bill Manny of the East Oregonian, October 27, 1983 644
        - "Windfall Fees for Civil-Rights Lawyers," the Seattle Times, April 4, 1984 645
        - "Attorneys Debate Legal-Fee Award Law," the Spokane Chronicle, March 29, 1984 646
        - "Lawyer Disagrees With Limits Put on Civil-Rights Case Fees," by Frances Huessy, the Spokesman-Review, March 30, 1984 647
        - "The Mandate, The Mayor, and the Menace of Liability," by Cynthia Cates Colella from the ACIR's Structures and Functions section 648
        - "Can Lawyers Sue For Equal Pay?" by ARIC Press with Peggy Clausen and Nikki Greenberg in Newsweek, October 3, 1983 659
        - "Statement of The Alliance For Justice." Prepared by Robert L. Baumann and Barbara R. Shufro, Institute for Public Representation, Washington, DC 660
- Letters to Hon. Orrin G. Hatch from:
    - Nan Aron, September 18, 1984 693
    - Thomas H. Moreland, September 14, 1984 698
- "Counsel Fees in Public Interest Litigation" by the Committee on Legal Assistance From the Association of the Bar of the City of New York 700
    - E. Richard Larson, September 19, 1984 738
- Prepared Statement of J.H. McQuiston 748

THE LEGAL FEE EQUITY ACT

TUESDAY, SEPTEMBER 11, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 9:06 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman, Subcommittee on the Constitution) presiding.

Present: Senator DeConcini.

Staff present: Stephen J. Markman, chief counsel and staff director; Randall R. Rader, general counsel; Dee V. Benson, special counsel; Jeanne von Zastrow, chief clerk and Deborah Dahl, clerk (Subcommittee on the Constitution); Dick Bowman (Senator Thurmond); Ed Baxter (Senator DeConcini); Veronica Gonzales (Senator Grassley); Ben Scotch (Senator Leahy); Steven R. Valentine (Senator East) and Steven Metalitz (Senator Mathias).

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. We will call the subcommittee to order.

In 1974 the Supreme Court declared that Federal courts have no authority, in the absence of a statute, to shift a prevailing plaintiff's attorney fees to the defendant. That was the case of *Alyeska Pipeline Service Company* v. *Wilderness Society.* (421 U.S. 240). The *Alyeska* case thus restates the 188-year-old American rule that, in the absence of a different statutory rule, each litigant pays his own attorney. Since then, however, Congress has enacted over 100 fee-shifting statutes. Few of the fee awards under these laws are as large as the $2,204,534.99 granted in a single case in 1980 in (*Keith* v. *Volpe,* 501 F. Supp. 403 (C.D. Cal. 1980)). Nonetheless the availability of lucrative awards has produced a veritable landslide of litigation. In 1980 alone, the Supreme Court issued nine opinions concerning court-awarded attorney fees. That same year, the fifth circuit decided over 50 fee cases. The State of Washington currently has pending against it over $8 million in attorney fee claims. In recent years fully 80 percent of all substantive civil rights judgments against Florida have been fee awards, including $2.6 million paid during 1983.

The Supreme Court has reacted with disfavor to this explosion of litigation. The Court commented in 1983 that fees litigation is "one of the least socially productive types of litigation imaginable." Four Justices have argued that litigation over attorney fees "serves no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets." (*Hensley* v. *Eckerhart,* 103 S. Crt. 1933 (1983)). A hint of the Court's frustration may be heard in a recent concurrence which notes that fee shifting is becoming "a vast body of artificial judge-made doctrine, with its own arcane procedures, which, like Frankenstein's monster, meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake." Id. at 1951. In a recent case where 186 hours were devoted to resolution of the merits and over 350 hours to the fees issues, the seventh circuit lamented that "the [attorney fees] tail is wagging the [civil rights] dog." (*Mills* v. *Eltra Corp.,* 633 F.2d 760, 761 (1981)).

One of the main problems is that these fee-shifting statutes contain only sketchy standards for setting "reasonable" fees. The operative language of these statutes consists of 24 words: "* * * the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Judges are left to create widely varying rules governing eligibility for and the amount of legal expenses shifted to Federal, State, or local governnents. Even a nominal award of $1 on a $200,000 claim has justified a recovery of thousands of dollars in attorney fees.

Not only has the sparsity of standards for fee awards clogged the courts, it has also led to exorbitant windfalls for lawyers. Some courts have even employed "multipliers" or "bonuses" to double or even triple an attorney's customary hourly rate when computing a fee award. For example, an attorney in Massachusetts recently requested $331,441 in fees at an effective hourly rate of $412.50 for his services. This request prompted the Washington Post to editorialize:

> * * * It reveals elements of a gigantic ripoff * * *. Lawyers—even civil rights lawyers—need at least as much wage restraint as others when it comes to billing the government. (Dec. 16, 1983, p. A22).

In other cases, a judgment of just over $30,000 gave rise to nearly a quarter of a million dollars in legal fees; a judgment of just over $2,000 resulted in a fee award of over $45,000. In many cases, the amount of fee awards is simply not proportionate to the degree of success.

Another problem with attorney fee policies is the obvious incongruency and inequity between these Federal fee shifting statutes and the Criminal Justice Act. Under the Criminal Justice Act, lawyers who defend indigent criminal suspects have received the same set rates—$20 an hour for out-of-court time and $30 an hour for in-court time—since 1970. Ironically, attorneys whose job it is to assert the rights and defenses of indigent criminal defendants are often subsidizing the Government while attorneys who choose to assert the rights of suing plaintiffs are often subsidized by the Government.

In 188 years, Congress has yet to undertake a comprehensive overview of attorney fee policies. This stems largely from the smooth and efficient operation of the American rule which has prevented litigants from being penalized for merely prosecuting or defending a lawsuit, has allocated attorney resources to the most meritorious cases, and has ensured that attorneys are responsible solely to their client. Since 1974, however, the American rule has been eroded by a multiplication of statutory exceptions and broad judicial interpretation of the vague terms of such laws. The American rule is being repealed piecemeal. Accordingly I commend the Reagan administration, particularly the Justice Department and the Office of Management and Budget, for addressing the attorney fee question comprehensively.

The Legal Fees Equity Act, S. 2802, establishes uniform standards for setting fees in both civil and criminal cases sufficient to attract competent counsel without granting windfalls to lawyers. No one questions that attorneys deserve adequate compensation for bringing or defending certain cases against governments, but standards are necessary to ensure those fees remain reasonable. Thus, S. 2802 offers Congress an overdue opportunity to review comprehensively attorney fee policies.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

In July of 1981, the Constitution Subcommittee began a series of hearings to examine the degree to which recent federal statutes and court opinions have subjected states and municipalities to growing liabilities for awards of attorney fees. Several leading state and local officials testified about the deleterious effects of these unanticipated liabilities. One state Attorney General, for instance, noted that: "States . . . have shown that they have paid sometimes ten times as much money to pay off these attorney fee awards than they had to pay to satisfy the monetary judgments entered in favor of the actual plaintiffs." (Hearings on S. 584 & 585, Subcommittee on the Constitution, 97th Cong. 1st Sess. 561 (1981).) At the same time, officials in the Reagan Administration undertook a review of the need for some standards to govern the award of attorney fees under numerous statutes which, under broadly defined circumstances, shift the entire expense of litigation to the state, local, or federal government defendant. S. 2802, the Legal Fees Equity Act, is the product of careful study to develop uniform standards for setting fees at levels sufficient to attract competent counsel without granting windfalls to lawyers.

This careful study has shown that standards for determining eligibility for and the amount of attorney fees awarded against government parties have varied widely from court to court and state to state. This has often resulted in the award of excessive fees. For example, some courts have even used "multipliers" to double or triple an attorney's customary hourly rate when computing the amount of a fee award. These inconsistent and troublesome results are primarily due to the ambiguity of fee-shifting statutes which provide no uniform standards for the award of attorney fees to a litigant who prevails to some degree in litigation against a government. Judicial and administrative officers are simply left without adequate guidelines in the law to to fashion uniform and fair awards.

The clear disparities in attorney fee policies are made evident by comparing the lack of definition in federal fee-shifting statutes governing in civil proceedings with the harsh strictures of the Criminal Justice Act (CJA). Under the CJA, attorneys who defend indigent criminal suspects have received the same rates -- $20 an hour for time expended on a case out of court and $30 an hour for time spent on a case in court -- since 1970. From 1970 to 1982 alone, the consumer price index rose from 116.3 to 289.1 (1967 equals 100). Because simple equity demands a reduction in the discrepancy between the awards granted private attorneys who sue governments in civil cases and the awards granted private attorneys who represent indigent criminal defendants, the Legal Fees Equity Act doubles the hourly rates compensable under the CJA.

Thus, the Legal Fees Equity Act is needed to provide standards and procedures for awarding attorney fees in proceedings against the United States as well as state and local governments in cases where federal statutes allow such awards. In addition, this legislation will double the

BEST AVAILABLE COPY

current fees for attorneys who defend indigents in criminal trials and receive compensation under the Criminal Justice Act.

Since first established by the Supreme Court in 1796, Arcambel v. Wiseman, 3 Dall. 306 (1796), the basic rule in America for the compensation of counsel has been that each party to a judicial proceeding is expected to bear the cost of his own litigation. The Supreme Court ruled in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1974), that federal courts lacked power to create exceptions to this rule by awarding fees to attorneys who undertook to enforce certain important rights. Alyeska makes it clear, however, that Congress may create exceptions to the traditional American rule by statute.

Since 1974 Congress has enacted over 129 fee-shifting statutes. These statutes authorize recovery of attorney fees in cases against state and local governments as well as the federal government. Most of these statutes simply grant the court discretion to award "reasonable attorneys' fees" to the prevailing plaintiff in a suit against a government. These enactments offer little or no guidance as to the limits of judicial discretion, the standards for determining a "reasonable" fee or the degree of success necessary to satisfy the prevailing requirement. Accordingly, the amount and complexity of litigation to determine the amount of counsel fees under these fee-shifting statutes has increased dramatically. In 1980 alone, the Supreme Court issued nine opinions on the award of attorney fees. That same year, the Fifth Circuit decided over 50 reported cases on counsel fees.

The Supreme Court reacted to this veritable flood of litigation with the comment that "a request for attorneys fees should not result in a second major litigation." Hensley v. Eckerhart, 103 S. Ct. 1933, 1941 (1983). In that same case, Justice Brennan argued that litigation over attorney fees "serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets." (Id. at 1950.) A hint of the Supreme Court's frustration with the absence of adequate legal standards governing the award of "reasonable" fees emerges later in Justice Brennan's concurrence:

> Ultimately {the fee shifting statute's} straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which, like Frankenstein's monster, meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake. (Id. at 1951.)

Not only has the absence of standards for the award of attorney fees clogged the courts, it has also led to exorbitant fee awards. A recent request for fees in Massachusetts is an example of this problem. A zoning law was declared unconstitutional after a lengthy series of appeals. The attorney, who is also a full-time law professor, requested $331,441 in fees at an effective hourly rate of $412.50 an hour for his services. The WASHINGTON POST issued the following commentary on that case:

> High-priced lawyers are just charging much too much -- to the point of caricature -- and the folks expected to pay their fees should put an end to the practice. Just because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous. The "prevailing wage" approach that government uses when it is buying services -- which is the essence of Professor Tribe's claim -- has a superficial appeal. But on closer inspection it reveals elements of a gigantic rip-off. . . Lawyers -- even civil rights lawyers -- need at least as much wage restraint as others when it comes to billing the government.

The POST might also have asked how an hourly rate of $412.50 can be justified alongside the limits of $20 per hour imposed on attorneys relying on the Criminal Justice Act.

In the absence of adequate computation standards, attorney fee awards have also been subject to the criticism that the award is disproportionate to the degree of success achieved in the underlying case. For instance, in Skoda v. Fontani, 646 F. 2d 1193 (7th Cir.1981), the plaintiff was awarded one dollar in damages, but the attorney fee award was awarded over six thousand dollars. In Rivera v. City of Riverside, 679 F. 2d 795 (9th Cir. 1982), the plaintiff was awarded $33,000 in damages, but the attorney fee award was nearly a quarter of a million dollars. The National Association of Attorneys General recently completed an exhaustive report on the award of attorney fees under the fee-shifting statute most often employed against state and local governments. This report gives a comprehensive overview of the problems created by the lack of adequate standards for the award of attorney fees. I would urge each of my colleagues to read this report.

The overall purpose of this proposal is to provide the courts and federal agencies with greater guidance in implementing federal fee-shifting statutes. This bill would not deny fees to prevailing attorneys, but would set standards and procedures to ensure that such fees are "reasonable." An important element of the standards proposed by this legislation is a cap of $75 per hour on attorney fees awarded against the government in civil judicial or administrative proceedings. This $75 per hour fee cap is the same rate established in the recently enacted Equal Access to Justice Act, 28 U.S.C. 2412 (d) and 5 U.S.C. 504 (b). The bill would, therefore, allow courts to compensate private attorneys at a level commensurate with, though still higher than, that received by the government attorneys they oppose.

In the absense of adequate statutory guidance, some courts have used bonuses and multipliers extensively to escalate awards. Multipliers were justified as compensation for litigating a particular complex case, as a reward for high quality work by the attorney, or as an offset for the riskiness or contingency of the case. In the recent Supreme Court case of Blum v. Stetson, __U.S.__(March 21, 1984)(slip op. no. 81-1374), found that these justifications for multipliers "do not withstand examination." (Id. at 9.) The complexity of a case will be reflected in the number of hours expended in preparation. The quality of an attorney's work will be reflected in the customary hourly rate used to compute his award. Contingency is an element of every case brought under these fee-shifting statutes because they require a litigant to prevail in order to qualify for an award. This "prevailing" requirement was enacted by Congress to discourage frivolous or meritless suits. Granting a bonus for risky cases would be at odds with Congress's intent to award fees only for meritorious suits. Thus, where bonuses are used to compensate attorneys who are handling complex or novel cases, the net result is to inflate compensation which has already been adequately provided. Bonuses for contingency defeats a primary purpose of only compensating litigants for meritorious suits. Consistent with the Stetson case, this bill would eliminate the use of multipliers and bonuses in an effort to avoid absurdly high awards.

The bill is intended to apply to all awards of attorney fees against the United States and any state or local government. Its provisions apply to, and modify, all federal fee-shifting statutes, but do not supersede more restrictive criteria contained in other statutes. This includes awards made under the Equal Access to Justice Act, except certain specified provisions of that act.

Federal fee-shifting statutes generally contain language indicating that such awards are available only to "prevailing parties." Ambiguities have developed concerning when a party has adequately prevailed so as to come within the statutes. For example, Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), adopted a standard which held that if a party had succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," while Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981), held that a party must have been "successful on the central issue as exhibited by the fact that he has acquired the primary relief sought."

The Legal Fees Equity Act clarifies this standard by requiring that a party prevail on the merits in order to obtain an award of fees. The bill's standard is neither as lenient as the "some benefit" test nor as strict as the "central issue" test. The relief sought must be "significant," not merely of "some benefit." Moreover an award of attorney fees may not be obtained prior to a final judgment. This latter requirement is not meant to be read so as to preclude interim awards where Congress has authorized them in the various fee-shifting statutes. Neither is the requirement of final disposition intended to preclude recovery of attorney fees where settlement is reached prior to judgment. Such settlements are generally desirable and so long as it can be shown that the party has prevailed on the merits of the relief sought an award of attorneys' fees may still be obtained.

Where a settlement offer is made by government officials and refused by the plaintiff who is unable thereafter to do any better at final judgment, this bill would deny the recovery of attorney fees for services performed subsequent to the refused offer. Such a provision will encourage government officials to make responsible settlement offers and urge complainants to give those offers meaningful consideration. Of course, where refusal is reasonable under the circumstances this provision would not apply.

The bill also provides that the amount of any judgment awarded against the United States, or against a state or local government shall be reduced by the amount of the attorney fees, not to exceed 25% of the judgment. This provision ensures that prevailing parties will pay part of their legal expenses from any monetary award. This subsection of the bill is not applicable to specific sections of the Equal Access to Justice Act, to certain tax cases or where it would result in undue hardship to the party.

Due to the protracted nature of some litigation, a claim may be rendered moot by state or federal legislation enacted prior to judicial resolution of the conflict. Under existing case law such a turn of events would not preclude a recovery of attorneys' fees where a court determined that the case was a catalyst for the legislative change. See, e.g., Maher v. Gagne, 448 U.S. 122 (1980). This judicial doctrine, however, involves the courts in the rather difficult and unpredictable process of determining that a particular court action was the catalyst for a legislative enactment. As my colleagues understand, legislators rarely have the same things in mind when voting for a particular bill. A judicial inquiry into legislative motives is difficult at best. The Legal Fees Equity Act provides a standard for determining when a case provides such a catalyst by requiring that the litigation be a "material factor" in the legislative change. This provision would permit legislators and other state officials to proceed with policy changes without fear of incurring costly litigation expenses because some pending suit peripherally relates to their actions.

Finally, the bill contains several other provisions for timely application and uniform procedures to be followed in seeking recovery of attorney fees. The provisions of this bill would apply to all cases commenced subsequent to enactment as well as to those commenced prior to enactment respecting that amount of the attorney fees and expenses incurred following the date of enactment.

The sparsity of guidance given by the terse language of the myriad fee-shifting statutes is perhaps itself sufficient evidence that some clear standards are necessary to govern the award of attorney fees. Moreover the need to provide greater balance between the attorney fees policies applicable to lawyers representing indigent criminal defendants and those applicable to lawyers who sue governments civilly argues for the Legal Fees Equity Act.

Senator HATCH. We are very happy today to be able to hold this hearing and to move forward in this particular area.

We are very happy to have the distinguished Senator from Arizona here today, Senator DeConcini, and we turn to you at this time, Senator.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Thank you, Mr. Chairman, for the opportunity to participate in the hearing this morning

As you know, I am very interested in the whole issue of lawsuits in which governments are parties. I have considered several bills already this Congress dealing with this kind of litigation. We are trying to reauthorize the Equal Access to Justice Act, we are trying to grant some kind of immunity to local governments faced with treble antitrust damages; and we still have pending before this subcommittee a bill to grant local governments a good-faith defense in civil rights suits.

While I am sure the committee is not going to have the opportunity to consider S. 2802 this Congress, I believe that the testimony that we will receive this morning will be very useful in establishing a record for next year. I am hopeful that the administration will listen carefully to the suggestions and criticisms offered today, and, if they have the opportunity, offer us an even better bill even next year.

I believe very strongly that individuals who have legitimate grievances with their government should have every right to bring those grievances to the courts. I further believe that governments are obliged to provide the funds necessary to ensure that those with legitimate grievances have competent counsel and reasonably unrestricted access to our courts.

In my opinion, S. 2802, as it is presently formulated, represents an unreasonable obstruction to such access, but I have an open mind, Mr. Chairman, and I will look forward to working with you as usual in an effort to build better legislation.

Thank you.

Senator HATCH. Thank you, Senator. We are happy today to welcome Carol Dinkins, Deputy Attorney General of the United States.

Before I do that, I would like to place in the record a statement as well as statements of Senator Charles Mathias, Jr., Senator Jeremiah Denton, and Senator Charles E. Grassley, without objection.

[The following was received for the record:]

II

98TH CONGRESS
2D SESSION

S. 2802

To provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil, criminal, and administrative proceedings in which the United States is a party, and in civil proceedings involving State and local governments.

IN THE SENATE OF THE UNITED STATES

JUNE 27 (legislative day, JUNE 25), 1984

Mr. THURMOND (for himself and Mr. HATCH) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil, criminal, and administrative proceedings in which the United States is a party, and in civil proceedings involving State and local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Legal Fees Equity Act".

FINDINGS AND PURPOSES

SEC. 2. (a) Congress hereby finds and declares that—

(1) many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against

the United States, or against State or local governments, in judicial and administrative proceedings;

(2) the failure to provide standards to guide courts and administrative bodies in awarding such fees has led to inconsistent interpretations of these Federal civil fee-shifting statutes, and in many instances to excessive awards of attorneys' fees under them;

(3) it is inappropriate for the Federal Government to impose on State and local governments the statutory requirement to pay awards of attorneys' fees without providing standards by which to make such awards;

(4) the limitation of $75 per hour recently prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorneys' fees against the United States, or against State or local governments, in judicial or administrative proceedings;

(5) it is inappropriate for awards of attorneys' fees to be made to parties who have not prevailed on the merits of their complaint against the United States, or against State or local governments, in judicial or administrative proceedings;

(6) it is appropriate that parties in judicial or administrative proceedings against the United States, or

against State or local governments, pay a reasonable portion of their attorneys' fees when monetary awards are recovered;

(7) statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees and related expenses or costs may be made against the United States, or against State or local governments, in judicial or administrative proceedings; and

(8) there is a need to increase the level of compensation for attorneys who defend indigent defendants in Federal criminal proceedings under the Criminal Justice Act, (18 U.S.C. 3006A), which has not been amended since 1970.

(b) It is the purpose of this Act—

(1) to establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies;

(2) to require that awards of attorneys' fees against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies be

made only to parties who have prevailed in the proceedings;

(3) to prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies; and

(4) to increase the maximum hourly rate of compensation payable to attorneys in Federal criminal proceedings under the Criminal Justice Act.

DEFINITIONS

SEC. 3. For the purpose of this Act—

(1) "attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law (but shall not include services by pro se claimants), or to services by enrolled tax practitioners with respect to proceedings before the United States Tax Court, plus overhead expenses, as defined in this Act, but does not include related expenses;

(2) "fee-shifting statute" means any Federal statute that provides for recovery by a party of attorneys' fees or related expenses against the United States, or against a State or local government;

(3) "overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, rent

or mortgage payments, maintenance (including heating and cooling costs), furniture and supplies, reporters, treatises, and other books, secretarial and other clerical and librarian time (including computer word processing expenses), telephone services and calls, and mailing expenses;

(4) "related expenses" means those expenses that may be awarded pursuant to a Federal law, and which are actually incurred by the attorney in connection with judicial or administrative proceedings, but does not include attorneys' fees or overhead expenses, as defined in this Act, or costs enumerated in section 1920 of title 28, United States Code;

(5) "party" means, for purposes of judicial proceedings, a party as defined by rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of title 5, United States Code, which is an individual, partnership, corporation, association, unincorporated business, estate, or public or private organization other than an agency. The term "party" does not include the United States, or any State or local government, except when a State or local government opposes the United States in a judicial or administrative proceeding;

(6) "judicial proceeding" means a civil proceeding in any court or under the jurisdiction of a judicial officer, in which a party may under Federal statute be awarded attorneys' fees or related expenses;

(7) "administrative proceeding" means any proceeding, other than a judicial proceeding, in which a party may by statute be awarded attorneys' fees or related expenses;

(8) "administrative officer" means the official(s) or person(s) authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official(s) or person(s) designated by the head of the agency as the administrative officer(s) for the purpose of this Act;

(9) "prevailed on the merits" means having succeeded on significant issues in the controversy and obtained significant relief in connection with those issues, and may include, where the party is a defendant in a suit by the government, obtaining the dismissal of the complaint;

(10) "decision on the merits" means a final judgment by the court, within the meaning of rules 54 through 58 of the Federal Rules of Civil Procedure, in which a party establishes entitlement to relief on the merits of the claim or claims brought in the proceed-

ing, and includes a dismissal with prejudice or a dismissal pursuant to a settlement agreement;

(11) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity;

(12) "State" means any State government, or any agency of the State government, or any official of the State government acting in his or her official capacity, and includes the territories and the District of Columbia; and

(13) "local government" means any county, city, town, municipality, municipal corporation, school board, or other political subdivision created by a State, or any agency of such entity, or any official of such entity acting in his or her official capacity.

SCOPE AND APPLICATION; RELATIONSHIP TO OTHER LAWS

SEC. 4. (a) The provisions of this Act—

(1) apply to the award of attorneys' fees and related expenses authorized, pursuant to any Federal fee-shifting statute, to be made against the United States, or against State or local governments, in any judicial or administrative proceeding, and

(2) establish minimum criteria and requirements for the award of attorneys' fees and related expenses to which this Act applies.

(b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against State or local governments, in any judicial or administrative proceeding, except as expressly authorized by Federal statute (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

(c) The provisions of any applicable Federal fee-shifting statute that establish criteria or requirements in addition to those provided in this Act for the award of attorneys' fees and related expenses in such proceedings, or that otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act. Where an award of attorneys' fees is authorized both under a Federal fee-shifting statute and under the common law, such award shall be made in accordance with the provisions of the applicable Federal fee-shifting statute and with the provisions of this Act.

(d) Nothing in this Act shall be interpreted—

(1) to create any right to an award of attorneys' fees or related expenses against the United States, or against State or local governments in any judicial or administrative proceeding, or

(2) to provide authority for any court or administrative officer to make such an award of attorneys' fees or related expenses in such proceeding.

(e) Awards of attoneys' fees and related expenses otherwise authorized under section 504 of title 5 of the United States Code or section 2412(d) of title 28 of the United States Code (the Equal Access to Justice Act) shall be made in accordance with the provisions of this Act, except that subsections (a)(1), (b)(4), (b)(5), and (c) of section 6 of this Act shall not apply.

(f) The provisions of this Act, except the amendment made by section 6(d) of this Act, shall not apply to compensation of attorneys in Federal criminal proceedings, or in civil habeas proceedings under the Criminal Justice Act.

ALLOWANCE OF ATTORNEYS' FEES

SEC. 5. A party otherwise eligible to receive attorneys' fees and related expenses to which this Act applies must establish that—

(1) the party has prevailed on the merits against the United States, or against a State or local government;

(2) the attorney's fees and related expenses for which the award is sought—

(A) resulted from work performed in connection with issues upon which the party prevailed, and

(B) such work was necessary to resolve the controversy;

(3) The application for attorneys' fees and related expenses is made in accordance with section 7 of this Act;

(4) The attorneys' fees sought are not in excess of the amount permitted under section 6(a) of this Act; and

(5) The attorneys' fees sought are for services that are not excessive, redundant, or otherwise unnecessary.

AMOUNT OF ATTORNEYS' FEES

Civil Fee-Shifting Statutes

SEC. 6. (a)(1) No award of attorneys' fees against the United States, or against a State or local government, to which this Act applies shall exceed $75 per hour.

(2) Bonuses or multipliers shall not be used in calculating awards of attorneys' fees.

(b) The court or administrative officer of an agency may reduce or deny the amount of attorney's fees and related expenses otherwise allowable, based on a finding that—

(1) the prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted the final resolution of the controversy;

(2) there is no bona fide attorney-client relationship with an identified client;

(3) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly salary of the attorney representing the party;

(4) the time and legal services provided were excessive with regard to the nature of the controversy;

(5) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or injunctive relief achieved in the proceeding; or

(6) a reduction or denial of the amount of attorneys' fees would otherwise be appropriated under the applicable fee-shifting statute.

Courts and administrative officers shall exercise their discretion in determining the amount of any reduction of an award under this subsection.

(c) The monetary judgment awarded in any judicial or administrative proceeding shall be reduced (but not by more than 25 per centum thereof) by the amount of attorneys' fees otherwise authorized to be made against the United States, or against State or local governments. This subsection shall not apply to awards of attorneys' fees—

(1) as provided in section 4(e) of this Act;

(2) pursuant to section 7430 of the Internal Revenue Code; or

(3) where undue hardship would result.

Criminal Justice Act Fees

(d) Subsection (d) of section 3006A of title 18, United States Code, is amended—

(1) by striking out "$30" in paragraph (1) and inserting in lieu thereof "$60";

(2) by striking out "$20" in paragraph (1) and inserting in lieu thereof "$40";

(3) by striking out the words ", or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district" in paragraph (1);

(4) by striking out "$1,000" each place it appears in paragraph (2) and inserting in lieu thereof "$2,000";

(5) by striking out "$400" in paragraph (2) and inserting in lieu thereof "$800"; and

(6) by striking out "$250" in paragraph (2) and inserting in lieu thereof "$500".

TIMELY APPLICATIONS AND PROCEDURES

SEC. 7. (a) In any judicial or administrative proceeding to which this Act applies, a party may seek an award of attorneys' fees and related expenses only within thirty days after either a decision on the merits by the court or the entry by an administrative officer of an agency of a final decision in an administrative proceeding. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or administrative officer of the agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees and related expenses. In no event shall an award of attorneys' fees and related expenses be made prior to entry of a decision on the merits by the court or entry by an administrative officer of a final decision of an administrative proceeding.

MOOTNESS AND SETTLEMENT DEFENSES

SEC. 8. No award of attorneys' fees and related expenses subject to the provisions of this Act may be made—

(1) where the Government demonstrates that—

(A) the claims have become moot due to a change in government policy, and

(B) the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that—

(A) the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and

(B) the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred.

COMPTROLLER GENERAL REPORT

SEC. 9. The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees and related expenses awarded during the preceding fiscal year against the United States, or against State or local governments, in judicial and administrative proceedings to which this Act applies. The courts and each agency shall provide the Comptroller General with such information as is necessary to comply with the requirements of this section.

EFFECTIVE DATE

SEC. 10. The provisions of this Act shall apply to any award of attorneys' fees and related expenses incurred subsequent to the enactment of this Act, including those incurred after such date in actions commenced prior to such enactment.

○

Prepared Statement of Senator Charles McC. Mathias, Jr.

As the sponsor of S. 2420, the Criminal Justice Act Amendments of 1984, I am pleased that the Subcommittee on the Constitution today begins hearings aimed at forging a consensus on positive action to revitalize the Criminal Justice Act of 1964 (CJA).

Our national commitment to effective assistance of counsel for those accused of crime is expressed in the Sixth Amendment to the Constitution. Today that commitment needs to be revigorated. The statutory vehicle for carrying out that commitment in the Federal courts, the CJA, needs to be updated.

There is little dispute about this need. The Administration joins with the judicial Conference of the United States, the American Bar Association, and many other interested groups in putting out the serious shortcomings of the current law.

Today, the Subcommittee takes up the question of how best to correct these problems. It has before it two approaches: S. 2420, which is identical to the bill that recently obtained unanimous approval from the House of Representatives; and S. 2802, a bill that also proposes changes to various civil fee-shifing statutes.

I am confident that the Subcommittee will give both proposals careful but expeditious consideration. I hope that it will conclude, as I have, that a solution to the problems plaguing the CJA system must not be held up in order to await resolution of the throny and controversial issues arising from fee-shifting in civil litigation.

Most of S. 2802 is given over to provisions that would reform existing civil statutes under which successful litigants against federal and state government in civil rights, environmental, and other kinds of cases may, under certain circumstances, obtain awards of attorneys' fees. There is no better indication of the complexity of these issues than the fact that, after many months of study, it has taken the Administration until this summer even to propose a bill that addresses the subject comprehensively. No one can realistically expect that the controversies arising from S. 2802 can even begin to be resolved in time for action during the 98th Congress.

Reform of the CJA is quite a different matter. Although the approaches taken by my bill and by S. 2802 are somewhat different, there is enough common ground to hope that a consensus can be reached. Indeed, S. 2420 incorporates several changes made during House consideration in response to Administration suggestions. We should not allow the important, but collateral, problems of civil fee-shifting statutes to slow our response to the desperate needs of our federal criminal justice system.

I know that all the members of the Subcommittee on the Constitution share with me the goal of insuring that the command of the Sixth Amendment is translated into reality. To achieve that goal, we need an effective Criminal Justice Act, and we need it now. I urge the Subcommittee to act promptly on legislation to bring the CJA into line with the realities of the 1980's. That action will reaffirm our dedication to a federal criminal justice system that is effective, efficient and fair.

Prepared Statement of Senator Jeremiah Denton

Mr. Chairman, I commend you and our distinguished colleague, Senator Thurmond, for your leadership in sponsoring the Legal Fees Equity Act. I further commend you Mr. Chairman, for holding this hearing to demonstrate the magnitude of the problem and the need for remedial legislation.

The Legal Fees Equity Act will establish guidelines for the awarding of attorneys' fees in civil, judicial and administrative proceedings against Federal, State, and local government defendants. It will also raise the compsensation rate for attorneys representing indigent defendants under the Criminal Justice Act. The intent of the bill is to achieve a more equitable balance in compensation for the various attorneys litigating for or against the government, defense attorneys paid under the Criminal Justice Act, and private attorneys receiving fees under civil fee-shifting statutes.

Mr. Chairman, as you know, the watershed in fee-shifting history was the Supreme Court's decision in the case of *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1974), which held that Federal courts do not have the power to award attorneys' fees to a prevailing party without express statutory authorization. As a result of the decision, Congress enacted more than 129 fee-shifting statutes, the principal one being the Civil Rights Attorney's Fee Awards Act (42 U.S.C., section 1988)

The statutes provide that parties to civil suits and administrative proceedings against the United States, States or local governments may, under appropriate circumstances, recover "reasonable attorneys' fees" from the government defendants. The statutes have, however, placed a great burden on the courts because of the lack of congressional guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a result, courts have reached conflicting interpretations of the civil fee-shifting statutes. In some cases the courts have used "multipliers" and "bonuses" to double, and even triple, the normal hourly rates of the prevailing party's attorney.

The Legal Fees Equity Act will provide much needed guidance to the courts and Federal agencies for the award of attorneys' fees pursuant to Federal statutes, and will reduce the uncertainties and disparities reflected in current practices.

Specifically, the bill will:

Set a $75 per hour maximum rate for attorneys fees awarded, and eliminate the use of bonuses and multipliers to escalate fee awards. This will compensate "private attorneys' general" at a level commensurate with, but still significantly higher than, that of their government counterparts, but provide a reasonable incentive sufficient to attract competent counsel.

Allow recovery of attorneys fees only when a party has prevailed on the merits of its complaint, or where the suit is concluded by a favorable settlement agreement.

Allow recovery of attorneys fees only for work performed on issues on which the party prevailed.

Permit the reduction or denial of the amount of fee awards, for example, where a party has unreasonably protracted the litigation; where the services provided were excessive with regard to the nature of the controversy; or where the fee would unreasonably exceed the hourly salary of a salaried attorney.

Provide that monetary judgments be reduced by the amount of the attorneys fees allowed in the proceeding, but not by more than 25 percent. Exceptions are allowed for suits under certain provisions of the Equal Access to Justice Act, suits for recovery of disputed taxes, or in cases of undue hardship.

Establish certain procedural requirements for attorneys fee applications, including a 30 day time limit after final judgment for submitting fee applications, and require courts and agencies to develop additional guidelines.

Clarify the circumstances in which attorneys fees may be awarded when a claim becomes moot or the party refuses to accept a reasonable settlement offer.

Another important aspect of the bill will provide a greater balance between the high hourly rates of compensation for private attorneys who sue the government in a civil proceeding and the much lower hourly rates of compensation for attorneys who represent indigent criminal defendants in proceedings under the Criminal Justice Act.

In that area, the bill will:

Double the hourly rate of compensation, from $30 per hour for time in court and $20 per hour for out-of-court time to $60 and $40 per hour, respectively.

Double the maximum allowable compensation for various judicial proceedings. The new limits would be $2,000 per attorney for felony cases, $800 for misdemeanor cases, and $500 for post-trial and parole revocation proceedings.

Mr. Chairman, I welcome the guidance and reform that the Legal Fees Equity Act would offer. I commend you and Chairman Thurmond for your leadership in a neglected but important area.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Thank you Mr. Chairman. S. 2802 would make comprehensive changes in the way in which the Federal Government pays attorneys' fees for indigent criminal defendants and for prevailing parties in civil suits. It doubles the rate at which criminal defense attorneys are compensated and while I am always concerned about how tax dollars are spent, this increase is not unreasonable in light of the fact that consumer prices have increased 170 percent since the present compensation rates were established in 1970. At the same time, it attempts to limit the rate at which prevailing parties in civil cases have their attorneys' fees paid to a rate of $75 per hour, as in the Equal Access to Justice Act, and abolishes all multipliers or bonuses.

Mr. Chairman, the ability to obtain adequate counsel when accused of a crime has long been recognized as one of our most important rights. Yet the current rate of compensation makes this 6th Amendment guarantee illusory. The current rate of compensation of $20 an hour for an attorney's services and $30 an hour for court-appearance time, together with its $1000 limit on attorneys' fees, are well below the prevailing rates. The result is that experienced attorneys steer away from the defense of indigents, leaving only those of less experience to provide representation. While I do not believe that this constitutes a violation of our constitutional rights—because counsel is still provided, it does come close to failing our basic duties to provide adequate counsel.

While we have shortchanged the criminal court system, at least in as far as attorney compensation is concerned—we have gone to the other extreme in civil litigation. We are all now familiar with the recent request of professor Tribe to be paid what amounts to a "bonus" in the Massachusetts liquor license case. This distinguished constitutional scholar may well have been the best person to litigate this case and the Massachusetts law may very well have deserved to be stricken down. But nothing in the Constitution or the statutes enacted by the Congress require the taxpayers of this country to pay for the best legal representation. They require nothing more than adequate legal representation.

Attorneys fees, particularly in the area of civil liability, are one of the "boom industries" of local, state, and the federal government. An increasingly larger share of each agency's budget is allocated to attorney fees and other litigation costs. The National Association of Attorneys General has made this clear in its report to the Congess. While I am a strong supporter of the Equal Access to Justice Act and its permanent reauthorization, some effort must be made to bring attorneys' fees under control, and as the rest of S. 2802 indicates, EAJA's $75 an hour ceiling may be the place to do it.

Mr. Chairman, I look forward to reviewing the record of these hearings in the hopes that the vehicle for such budgetary control—not only for the federal government, but of even more importance for state and local government, lies within the pages of S. 2802.

Senator HATCH. Ms. Dinkins, we are very pleased to have you with us. We look forward to taking your testimony, and we will do it right now.

STATEMENT OF HON. CAROL DINKINS, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Ms. DINKINS. Thank you, Mr. Chairman. I am pleased today to appear in support of S. 2802. The Department of Justice has proposed this bill to bring some much-needed rationality to the system for awarding attorney fees paid for by the taxpayers under the numerous attorney fee statutes enacted by Congress.

The enactment of this bill would provide comprehensive reform and greater balance in both criminal and civil cases. Rather than detailing all of the provisions of the bill here, I am submitting for the record a longer written statement that fully describes the bill and amplifies my oral statement.

Senator HATCH. Without objection, we will place your complete written statement in the record, and we do appreciate your summarizing.

Ms. DINKINS. Thank you. I am also submitting for the record several tables of information.

Congress has enacted some 129 statutes providing for the award of attorney fees to parties in litigation before the courts or administrative agencies. Congress in those laws has altered the traditional American rule that each party to litigation bears its own legal expenses.

A significant percentage of these statutes allows private parties to recover attorney fees from the Federal Government or from State and local governments, greatly expanding the liability of governments at all levels for the legal expenses of the opposing private parties in litigation. These fee-shifting statutes reflect the judgment of Congress the departure from the American rule is appropriate to enable indigent parties, small businesses, victims of discrimination, and others to attract competent counsel to vindicate meritorious claims.

In addition to the civil fee-shifting statutes, the Criminal Justice Act provides for the appointment of private counsel to represent indigent defendants in Federal criminal prosecutions.

The Department of Justice naturally has a considerable interest in the award of statutory attorney fees. The Department represents the agencies of the Federal Government in enforcement suits and defends most of the suits brought against the Government. The Department also prosecutes actions under the Federal criminal laws against defendants, many of whom are represented by counsel appointed under the Criminal Justice Act.

For too long, issues relating to Government compensation of private attorneys have not been addressed on a comprehensive and coordinated basis. Accordingly, confusion abounds.

To resolve this confusion, it is essential to consider the various civil fee-shifting statutes in relation to each other and to the Criminal Justice Act attorney fee provisions.

Three different types of difficulties occur in the administration of the various fee-shifting statutes. The most obvious is the increasing incidence of inordinately high attorney fees or warrants through the use of multipliers and other means.

Second is the great disparity in awards that seems sometimes to border on the irrational.

Third, and increasingly noticed by both judges and commentators, is the growing burden on the courts and litigants imposed by a system where the rules are unclear and where the parties are encouraged to engage in expensive litigation of attorney fee issues rather than to enter into settlements on the amount of attorney fees.

Though much of our immediate attention focuses on the effect of Federal fee-shifting statutes, the State and local governments are experiencing these problems on an even larger scale, because their scope of potential liability is greater and because attorney fees impose a much larger burden on the public treasury.

With the partial exception of the Equal Access to Justice Act, the civil fee-shifting statutes provide courts with only rudimentary standards and principles for the award of attorney fees, so courts frequently have either interpreted these statutes inconsistently or they have reached inappropriate results.

The goal of attorney fee statutes, as Congress stated in enacting one law, is to provide "fees which are adequate to attract a competent counsel but which do not produce windfalls to attorneys."

But in practice, basing these fees on the prevailing market rate for legal services in the community often means that the hourly rates awarded are as high as those charged by corporate law firms rather than a fee that is sufficient to attract competent counsel.

Some courts have used bonuses and multipliers which sometimes double or even triple the hourly rates.

Table A in my submission for the record contains the relevant cases reported in the past several years for which we have been able to gather information. We estimate that the use of upward adjustments or multipliers to increase the lodestar—which is the reasonable hourly rate multiplied by the hours worked on the case—has increased the amount that Government was required to pay in attorney fees by an average of 43 percent at the Federal level and 41 percent at the State and local level.

We do not believe that bonuses and multipliers should be used to increase an hourly rate that a court already has determined to be reasonable.

The Supreme Court's recent decision in *Blum* v. *Stenson* generally ruled out several different rationales that have been offered for the use of bonuses and multipliers, such as the quality of representation, the results obtained, and the novelty and complexity of representation of the issues, because all of these considerations normally are reflected in the calculation of the hourly rate.

Another factor often used as the basis for a bonus is to cover the risk of not prevailing in a case. We oppose the use of such a contingency factor to compensate counsel for the cost of cases that are lost.

The Federal Court of Appeals here in Washington recently observed, and I quote:

> Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorney fees is not unlike compensating attorneys for unsuccessful claims. It hedges the statute's requirement that only prevailing parties may recover attorney fees.

In practice, high hourly rates combined with bonuses and multipliers not only encourage unmeritorious litigation, but also overcompensate lawyers at the expense of the taxpayers.

The fee-shifting statutes are to provide access to counsel, not—and I quote from a decision of the seventh circuit—"to create a fee bank to be liberally drawn upon by lawyers for their own welfare."

The fifth circuit has observed that fee-shifting statutes are not intended "to make the private attorney general's position so lucrative as to ridicule the public attorney general."

The issue of attorney fees has become such a big ticket item in many cases that lawyers now retain their own counsel to handle these issues.

Some law firms have long advertised their specialization in the recovery of attorney fees under the Federal statutes.

Many legal treatises have been written on this subject, including this one, which prominently displays dollar signs and I think underscores the attitude toward these types of fees as the lure of attorney fee litigation.

The use of a prevailing rate system to calculate fee awards produces results that increasingly bear little relationship to the actual cost necessary to make legal counsel available.

Unfortunately, the trend in attorney fee awards may be to make publicly financed fee awards even more generous than fees charged in private practice.

Because the constraints that normally apply in private practice—discussion and negotiation of the fees with the client—are absent in the fee-shifting context, attorneys are given the incentive to ask for ever-increasing hourly rates.

In addition, fee issues overshadow the case on the merits and deplete valuable judicial resources. As Justice Brennan observed, "Appeals from awards of attorney fees must be one of the least socially productive types of litigation imaginable."

The Federal courts, and particularly the Supreme Court, have begun to react to these problems by fashioning judge made rules. Despite these admirable efforts to bring some order and consistency to the application of Federal fee shifting statutes, the entire burden of defining the appropriate standards should not fall to the courts in a case-by-case approach

The Federal courts, and the Supreme Court in particular, already have too pressing a docket of cases before them to allow such an approach.

In our view, Congress should finish the job it began and define the circumstances and procedures for the award of attorney fees.

Judge Gesell has observed, and I think expressed very well, his growing frustration with the law in this area. The workload of Washington's Federal district court, as he said, and I quote:

> Has been significantly increased in recent years by contested applications for attorney fees. Often these requests consume more court time and involve more paperwork than the underlying case. Congress would do well to consider how the fee-shifting process may be streamlined.

In keeping with Judge Gesell's counsel, the Department's proposed legislation is intended to provide better legislative standards, to reduce the incidence of excessive claims, and to alleviate the burden on the courts and parties as well as to prevent inappropriate burdens on the public purse.

As I mentioned earlier, the same problems the Federal Government faces are in some respects even more serious for the State and local governments. Attorney fee awards against them in recent years have expanded and far exceed the liability of the Federal Government.

Growing concern has also arisen over Supreme Court decisions making local governments liable to suits under the Federal antitrust laws with the corresponding liability for attorney fees.

Turning now from the civil fee-shifting statutes, I also want to focus attention on the need for reform in the criminal justice area.

Attorneys for indigent parties have been limited to no more than $30 per hour in court and $20 out of court with overall ceilings of $1,000 for felony cases and $400 for misdemeanors.

We believe that even as civil fee awards must be limited, maximum fees must be increased under the Criminal Justice Act.

S. 2802, therefore, would double the current rates for all cases under the Criminal Justice Act. This would make the Criminal Justice Act rates higher than the levels in virtually any State program for court-appointed counsel.

The separate House-passed legislation would amend only the Criminal Justice Act. But we believe that legislative action on attorney fees should address these fees in both civil and criminal contexts because they are interrelated. Many attorneys practice under both types of statutes, but drastically different incentives are provided by Federal law. The drastic difference should be dealt with by Congress in a coordinated manner to achieve a better balance.

The administration believes that any legislation in this area should meet the problems of both civil and criminal attorney fee statutes.

In summary, the department's proposed legislation would prevent the increasing number of serious abuses in Federal fee-shifting statutes that have occurred in recent years. It would, however, preserve the intent of Congress to extend reasonable legal assistance to groups and individuals who need it.

The bill would also inject much needed clarity into the current law. It would set an overall fee limitation that is reasonable, and it would provide long-overdue increases in the Criminal Justice Act compensation levels.

We feel that all of these provisions, taken as a whole, warrant broad and bipartisan support in the Congress.

Thank you, Mr. Chairman.

[The following was received for the record:]

PREPARED STATEMENT OF CAROL E. DINKINS

Mr. Chairman and members of the Subcommittee:

I am pleased to appear today in support of S. 2802, a bill "to provide comprehensive reforms in compensation of attorneys pursuant to federal statute in civil, criminal, and administrative proceedings in which the United States is a party, and in civil proceedings against state and local governments." The Department of Justice has proposed this bill to bring some much needed rationality to the system for awarding attorneys' fees -- paid for by the taxpayer -- under the numerous attorneys' fee statutes enacted by Congress.

According to recent estimates, Congress has enacted some 129 statutes providing for the award of attorneys' fees to parties in litigation before the courts or before administrative agencies. A significant percentage of these statutes allow private parties to recover attorneys' fees from the federal government or from the states.

In all such enactments, Congress has altered the traditional American Rule that each party to litigation bears its own legal expenses, greatly expanding the circumstances in which the federal government and the states and local governments are held liable for the legal expenses of the opposing private parties in litigation. Indeed, the recent Equal Access to Justice Act, codified at 28 U.S.C. §§ 504 and 2412(d), provides for the award of attorneys' fees to any prevailing party who meets certain eligibility requirements unless the federal government can show that its position in the litigation was substantially justified.

These so-called fee-shifting statutes were each enacted in response to important concerns. They reflect the judgment of Congress that a departure from the American Rule is appropriate to enable indigent parties, small businesses, victims of discrimination, and others to attract competent counsel to vindicate meritorious claims. With the notable exception of the Equal Access to Justice Act, however, these fee-shifting statutes provide courts only rudimentary standards and principles for the award of attorneys' fees. As a result, as I describe below, the cases awarding attorneys' fees are frequently marked by a confusion over the proper bases for fee awards and a waste of judicial resources in determining the proper award.

In addition to the civil fee-shifting statutes, the Criminal Justice Act, 18 U.S.C. § 3006A, provides for the appointment of private counsel to represent indigent defendants in federal criminal prosecutions.

The Department of Justice naturally has a considerable interest in the award of statutory attorneys' fees. This Department represents the agencies of the federal government in most of the enforcement suits brought by the government, and defends the great majority of suits brought against the government by private plaintiffs. In addition, the Department prosecutes actions under the federal criminal laws against defendants, many of whom are represented by counsel appointed under the Criminal Justice Act.

For too long, issues relating to government compensation of private attorneys have not been addressed on a comprehensive and coordinated basis. At least part of the confusion manifest in the attorney's fee area is due to the almost total lack of coordinated consideration of the various civil fee-shifting statutes -- in relation to each other and to the Criminal Justice Act attorneys' fee provisions.

I. Problems with Civil Fee-Shifting Statutes

Three different types of difficulties occur in the administration of the various federal fee-shifting statutes. First, and perhaps most obvious, is the increasing incidence of inordinately high attorneys' fees award, through the use of high hourly rates, multipliers, and other means. Second, and somewhat related to the first, is the great disparity in awards that seems at times to border on the irrational. Third, and increasingly noticed by judges and commentators, is the growing burden on the courts and the litigants imposed by a system in which the rules are unclear and parties are encouraged to engage in expensive litigation of attorneys' fees issues rather than enter into prompt and inexpensive settlement agreements. Finally, though much of the Department's immediate attention focuses on the effect of federal fee-shifting statutes, the states and local governments are experiencing these problems on even a larger scale -- because their scope of potential liability is greater and because attorneys' fee awards can pose a much greater burden on the public treasury.

A. In General

In our experience courts frequently have either interpreted these fee-shifting statutes inconsistently or reached inappropriate results. For example, courts have awarded fees to parties who lost most issues on the merits or obtained only minimal relief. 1/ In addition, attorneys' fees are generally based on the "prevailing market rate" for legal services in the community. See Blum v. Stenson, 104 S. Ct. 1541, 1545-47 (1984) (nonprofit legal services attorneys awarded fees based on prevailing market rates). In practice, this often means that the hourly rates awarded are as high as those charged by corporate law firms, rather than on a fee that is sufficient to attract competent counsel. These "prevailing market" rates may even exceed the hourly rates that the attorneys seeking fees normally would charge their private clients. 2/

Some courts have used bonuses and multipliers to increase the base fee award -- sometimes doubling 3/ or even tripling 4/

1/ See, e.g., Onisker, Logan & Dock v. Milliken, No. C-79-0142 (D. Utah July 18, 1980) (fee award of $22,000 where each of three inmates obtained judgments of $500).

2/ See Jordan v. Department of Justice, 691 F.2d 514, 523-24 (D.C. Cir. 1982) (fee allowances are basically to be measured by the market value of the services rendered, not the amount actually received by the attorney nor the amount that would have been received absent an award of fees); Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc) (attorneys are entitled to prevailing market rate even if it will yield a larger fee than that to which they are accustomed); Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 373 (D.D.C. 1983) (lawyers may receive court-awarded fees based upon rates that differ from those they normally command and that are even far in excess of their salary or hourly rates).

3/ E.g., Graves v. Barnes, 700 F.2d 220, 224 (5th Cir. 1983); Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983); Wells v. Hutchinson, 499 F. Supp 174, 211 (E.D. Tex. 1980).

4/ E.g., Rajender v. University of Minnesota, 546 F. Supp. 158 (D. Minn. 1982) (attorney's normal billing rates were tripled, resulting in total fee award of over $2 million); Keith v. Volpe, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5; total fee award of $2.2 million).

the hourly rates. Indeed, based upon cases reported in the past several years for which we have been able to gather information, we estimate that the use of upward adjustments or multiplication factors to increase the reasonable hourly rate has increased the amount that government was required to pay in attorneys' fees by an average of forty-three percent at the federal level, and by forty-one percent at the state and local level. 5/

We do not believe that bonuses and multipliers should be used to increase the hourly rate that the court has already determined to be reasonable. Several different rationales have been offered for the use of bonuses and multipliers -- including the novelty and complexity of the issues, the high quality of representation, and delays in payment. The Supreme Court's recent decision in Blum v. Stenson, 104 S. Ct. at 1548-49, however, has generally ruled out such factors as the quality of representation, the results obtained, and the novelty and complexity of issues because all these considerations are normally reflected in the calculation of the hourly rate. Another factor often mentioned as a basis for awarding a bonus is to cover the risk of not prevailing in a case. Although the Supreme Court has not yet had the opportunity to address this issue squarely (see Blum v. Stenson, 104 S. Ct. at 1550 n.17), we believe that the use of such a contingency factor clearly would be inconsistent with the spirit and intent of the various federal

---

5/ This information is presented in Table A of the materials that the Department is providing for the record.

fee-shifting statutes, each of which provides for the award of fees only to a party who achieves some specific degree of success on the merits. As the federal court of appeals here in Washington recently observed:

> "Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorneys' fees is not unlike compensating an attorney for unsuccessful claims; it hedges the statute's requirement that only prevailing parties may recover attorneys' fees." 6/

We oppose any such evasion of the statutory standards of eligibility for attorneys' fees.

In practice, high hourly rates combined with bonuses and multipliers not only encourage unmeritorious litigation, but also overcompensate lawyers at the expense of the taxpayers. The fee-shifting statutes are an attempt to increase access to counsel, not to "create a . . . fee bank to be liberally drawn upon by lawyers for their own welfare." 7/ Cases awarding overly generous compensation to private attorneys contrast sharply with the strictly limited salaries paid to attorneys who represent the government. As one court observed in a leading case,

---

6/ Murray v. Weinberger, No. 83-1680 (D.C. Cir. Aug. 24, 1984) (slip op. at 14).

7/ Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980). The legislative history of 42 U.S.C. § 1988 explains that "a reasonable attorney's fee" is one that is "adequate to attract competent counsel, but . . . [does] not produce windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

fee-shifting statutes are not intended "to make the private attorney general's position so lucrative as to ridicule the public attorney general." 8/

In one recent case that attracted considerable publicity (see New York Times, Dec. 14, 1983, at A22, col. 1), a law professor petitioned for an award of $332,441 -- at a billing rate of $275 per hour plus a multiplier of fifty percent, for an effective rate of $412.50 -- after he had successfully urged the Supreme Court to strike down a Massachusetts law that allowed churches and schools to veto liquor licenses for neighboring businesses. 9/ Though incurring little of the overhead expenses of attorneys in private practice, he argued that this rate was reasonable because comparable practitioners in the community charged similar rates and he had charged even higher rates to his private clients. Ultimately, the district court awarded the full hourly rate of $275, but denied the requested 50% multiplier. 10/ As a Washington Post editorial noted (Dec. 16, 1983, at A22, col. 1), the state had been asked to pay "a pretty hefty fee for a moonlighting academic who wins a liquor license case."

8/ Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974), cited favorably in the legislative history of § 1988. See S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

9/ Larkin v. Grendel's Den, Inc., 103 S. Ct. 505 (1982).

10/ Grendel's Den, Inc. v. Larkin, 582 F. Supp. 1220, 1228-29 (D. Mass. 1984). See also New York Times, Dec. 14, 1983, at A22, col. 1.

The issue of attorneys' fees has become such a big ticket item in many cases that lawyers now retain their own counsel to handle such issues. Indeed, some law firms have long advertised their specialization in the recovery of attorneys' fees under federal statutes. See, e.g., Legal Times, August 1982, at 14.

These problems are simply symptoms of a greater problem in the award of attorneys' fees: the use of a "prevailing rate" system to calculate fee awards. This system produces awards that increasingly bear little relationship to the actual cost necessary to make legal representation available to parties in litigation. The Washington Post editorial mentioned above explained succinctly why it is inappropriate to require the government to bear the same high hourly rates that corporate law firms may demand from their clients:

> "Just because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous. The 'prevailing wage' approach that government uses when it is buying services -- which is the essence of Prof. Tribe's claim -- has a superficial appeal. But on closer inspection it reveals elements of a gigantic rip-off."

In practice, as that editorial suggests, the trend in attorneys' fee awards may be to make publicly financed fee awards even more generous than fees charged in private practice. Because the constraints that normally apply in private practice -- discussion and negotiation of the fees with the client -- are absent in the fee-shifting context (see Blum v. Stenson, 104 S. Ct. at 1547 n.11), attorneys are given the incentive to ask for ever-increasing hourly rates. As noted above (see footnote 2), it is now not uncommon for attorneys to be awarded fees at an hourly now not uncommon for attorneys to be awarded fees at an hourly rate exceeding the rates which they charge their own private clients.

In addition, fee issues increasingly overshadow the case on the merits and deplete valuable judicial resources. Detailed factual showings may be necessary to justify hourly rates, for example, requiring discovery and evidentiary proceedings in some cases. The district court in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 389 (D.D.C. 1983), complained of "attorneys who, in their fervor to produce a thorough fee application, have buried this Court with an avalanche of documentation." As Justice Brennan has observed,

> "appeals from awards of attorneys' fees . . . must be one of the least socially productive types of litigation imaginable. . . . [I]n systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases." 11/

This is an undesirable, but inevitable, result of the misapplication of fee-shifting statutes designed only to make competent counsel available to those who otherwise could not afford it.

The federal courts, and particularly the Supreme Court, have begun to react to these problems by fashioning judge-made rules for the award of attorneys' fees under federal fee-shifting statutes. For example, the Supreme Court recently decided four cases limiting the circumstance in which attorneys' fees may be awarded. In Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983),

---

11/ Hensley v. Eckerhart, 103 S. Ct. 1933, 1944, 1951 (1983) (Brennan, J., concurring in part and dissenting in part).

the Court held that attorneys' fees may not be awarded under statutes that provide for such awards "where appropriate" unless the party has achieved some degree of success on the merits. In Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), the Court held that parties are not to be awarded fees for work on issues on which they did not prevail even if they prevailed on other issues. In Blum v. Stenson, 104 S. Ct. at 1549, the Court held that "[n]either complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the fee award." Finally, in Smith v. Robinson, 104 S. Ct. 3457 (1984), the Court affirmed the denial of attorneys' fees under the Education of the Handicapped Act (20 U.S.C. § 1415), which does not provide for the award of attorneys' fees, where the court did not need to address claims under 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Despite these admirable efforts to bring some order and consistency to the application of federal fee-shifting statutes, the entire burden of defining the appropriate standards for the award of attorneys' fees should not depend upon the courts and a case-by-case approach. The federal courts -- and the Supreme Court in particular -- already have too pressing a docket of cases before them to allow such an approach. Even apart from the direct burden on the judicial system, the result of creative judicial attempts to set standards where Congress has provided none may well be, in Justice Brennan's words,

> "a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the

> legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake." 12/

In our view, Congress itself should finish the job it began but largely failed to complete in passing these fee-shifting statutes initially. Congress itself should define the circumstances and procedures for the award of attorneys' fees under the various statutes it has enacted.

In a case barely seven months ago, marked by many of the problems I have been describing, Judge Gerhard Gesell of the District Court here in Washington very succinctly expressed his growing frustration with the law governing attorney's fee awards. In his opinion in that case, Judge Gesell admonished the plaintiff's counsel in the following words:

> "The United States District Court for the District of Columbia processes a large number of . . . cases where fees may be awarded under statutes, including cases to which the Equal Access to Justice Act applies. As a result its workload has been significantly increased in recent years by contested applications for attorneys' fees. Often these fee requests consume more court time and involve more paper work than the underlying case. Unable to settle the question of fees outside the court, lawyers make excessive claims and then must defend their work against charges of waste, overstaffing, ineffectiveness, and lack of competence. . . .
>
> It is now accepted that lawyers who prevail in these cases may be entitled to be paid a reasonable fee for services which are still somewhat euphemistically referred to as '*pro bono*.' Attorneys hope to receive and usually request massive fees which cover their time, overhead, out-of-pocket expenses and a handsome profit. Often the government is asked to pay for the 'learning experiences' of coveys of junior associates and other assistants assigned to a case to break the tedium of everyday practice. The concept of merely making lawyers whole has long since gone out the window. As yet,

---

12/ *Hensley v. Eckerhart*, 103 S. Ct. at 1951 (Brennan, J., dissenting).

> courts have had little success in fashioning tools for dealing with this burgeoning phenomenon.
>
> ". . . Lawyers who treat the EAJA as designed to compensate counsel in the same generous manner as some lawyers are compensated in private practice should take heed of the consequences. In passing this statute Congress clearly indicated that it did not intend to place such a heavy burden on the public purse. Failure to reach prompt and reasonable fee dispositions by settlement or efficient use of court proceedings may eventually jeopardize the golden goose. Congress, for its part, would do well to consider how the fee-setting process may be streamlined, perhaps through use of arbitration or promulgation of more definitive and simplified standards for passing on such fee requests." 13/

In keeping with Judge Gesell's counsel, the Department's proposed legislation is intended specifically to provide better legislative standards for attorneys' fee awards, to reduce the incidence of excessive claims, to alleviate the burden on the courts and the parties, and to prevent inappropriate burdens on the public purse. In our view, the problems that Judge Gesell so eloquently identifies require Congressional action.

B. Liability of State and Local Governments

Although my testimony has so far focused primarily on the award of attorneys' fees against the federal government, the same problems are in some respects even more serious for state and local governments. Under the Constitution, the states themselves are generally protected by the Eleventh Amendment against monetary liability to their citizens in suits in the federal courts. However, under recent Supreme Court decisions, federal actions can be brought against state officials and municipalities

---

13/ Ashton v. Pierce, Civil Action No. 81-719 (D.D.C. Feb. 3, 1984) (slip op. at 8-10).

under 42 U.S.C. § 1983 for violations of almost any federal statutory right -- even those having nothing to do with the traditional concept of civil rights 14/ -- with a corresponding right to attorneys' fees under § 1988. Growing concern has also arisen over Supreme Court decisions making local governments liable to suits under the federal antitrust laws, with a corresponding liability for attorneys' fees. 15/

Attorney's fee awards against the states and local governments have greatly expanded in recent years, far exceeding the liability of the federal government. The states and local governments, however, have much more limited resources with which to pay attorneys' fee awards -- particularly the smaller municipalities. The imposition of attorneys' fee liability on states and localities imposes upon Congress an even greater obligation to define more clearly the scope of federal fee-shifting statutes. Both the principle of federalism and common sense require that effort by the Congress.

In this respect, I am happy to see the panel of state attorneys general who are here to testify today on this legislation. Earlier this year, the National Association of Attorneys General issued an excellent report on attorneys' fee

---

14/ See, e.g., Maine v. Thiboutot, 448 U.S. 1 (1980) (state violation of federal statutory procedures for welfare payments); Maher v. Gagne, 448 U.S. 122 (1980) (state regulations in conflict with Social Security Act); Roth v. Board of Regents, 408 U.S. 564 (1971) (failure to renew contract for nontenured college instructor).

15/ See City of Boulder v. Capital City Communications, Inc., 455 U.S. 40 (1981).

awards against state and local governments under 42 U.S.C. § 1988, the principal federal fee-shifting statute applicable to them. That report sets forth an exhaustive analysis of the problems in this area and it deserves the careful consideration of Congress in weighing improvements to fee-shifting statutes.

II. Problems with the Criminal Justice Act Provisions

Against a backdrop of rapidly escalating and inconsistent attorneys' fee awards in the civil context, one group of private attorneys have, however, been compensated much less well in litigation with the government. Attorneys for indigent parties under the Criminal Justice Act have been limited to no more than thirty dollars per hour for time in court and twenty dollars per hour for time out of court. In addition, overall ceilings of $1,000 for felony cases and $400 for misdemeanor cases have also been imposed by provisions of the Criminal Justice Act that have not been changed since 1970. 16/

We believe that even as civil fee awards must be limited, maximum fees must be increased under the Criminal Justice Act. Our bill, S. 2802 would therefore double the current rates for all cases under the Criminal Justice Act. By doubling both the maximum hourly rates and per-case limits, the Department's bill

---

16/ Indeed, the rates of compensation for attorneys representing indigent defendants at the state level in some instances are even lower than the rates provided in the Federal Criminal Justice Act. See, e.g., "Lawyers Elsewhere See D.C. Strike as Precedent," Wash. Times, Oct. 11, 1983, at 9A (Virginia court-appointed attorneys receive $72 for misdemeanor cases, and $191 for felonies punishable by less than 20 years).

would make the federal Criminal Justice Act rates higher than the levels in virtually any state program for court-appointed counsel, which were listed in a survey in the National Law Journal, Sept. 26, 1983.

Although the House has passed a separate bill, H.R. 4307, that would amend only the Criminal Justice Act -- and a similar bill, S. 2420, is pending in the Senate -- legislative action on attorneys' fees should address fee awards in both the civil and criminal contexts. Indeed, both areas are interrelated. Many attorneys practice under both the Criminal Justice Act and civil fee-shifting statutes. Nevertheless, drastically different incentives are provided for each by federal law: strictly limited fees under the Criminal Justice Act, but highly profitable fees in civil cases. This drastic difference in incentives, though surely not intended by Congress, must be dealt with in a coordinated and rational manner to achieve a better balance. H.R. 4307 would completely fail to do that.

This Administration must insist that -- for the sake of fairness -- any legislation in this area should meet the problems of both civil and criminal attorneys' fee statutes.

III. Description of the Provisions of S. 2802.

The purpose of the bill we support today is to make court awards of attorneys' fees in suits against the government fairer and more predictable. The bill would preserve the availability of counsel by maintaining an adequate level of compensation for attorneys who prevail, but at the same time it would rein in the excessive awards to attorneys at the taxpayers' expense. This legislation would bring greater balance to the award of attorneys' fees against the government.

Let me briefly summarize the provisions of the bill.

First, the bill would amend the Criminal Justice Act, 18 U.S.C. § 3006(A)(d)(1) and (2), to double the compensation rates and total compensation levels for private attorneys in criminal cases and habeas corpus proceedings under that Act.

The remaining provisions of the bill would modify all federal statutes that authorize awards of attorneys' fees against federal, state, or local governments, as described below:

1. It would establish four prerequisites to an award of attorneys' fees against a government entity under all federal fee-shifting statutes:

-- First, a party must prevail on the merits of its complaint in order to recover fees. This would apply to all federal fee-shifting statutes, in keeping with the Supreme Court's holding in Ruckelshaus v. Sierra Club that attorneys' fees are recoverable only by parties who prevail in a case. However, the bill would not modify existing law providing that attorneys' fees may be awarded when a party achieves a favorable settlement before trial.

-- Second, consistent with Hensley v. Eckerhart, the work for which the fee award is sought must be necessary to resolve the controversy. The bill would not preclude attorneys' fees for work expended on alternative pleadings, so long as the alternative pleadings are reasonably directed to resolution of the merits of the controversy and the relief sought by the pleadings was not implicitly or expressly rejected by the court.

Consistent with Smith v. Robinson, however, attorneys' fees would not be allowed when the narrow statutory scheme specifically at issue does not provide for the award of attorneys' fees.

-- Third, the application for attorneys' fees must comply with the procedural requirements of the Act and not exceed amounts authorized under the Act.

-- And finally, the services for which attorneys' fees are sought must not be excessive, redundant, or otherwise unnecessary.

2. The bill would provide for a maximum rate of seventy five dollars per hour for attorneys' fee awards. That is the same amount recently determined by Congress to be appropriate for fee awards under the Equal Access to Justice Act, 28 U.S.C. §§ 504 and 2412(d). This limitation is necessary and appropriate to forestall skyrocketing legal fee awards, but should be adequate to ensure quality representation. Indeed, at that rate, attorneys who bill 1,500 hours a year would earn $112,500 annually. Attorneys who represent the federal government in litigation presently earn a fraction of this, even with overhead and fringe benefits taken into account. Moreover, the Department of Justice has issued an administrative directive limiting the compensation of private counsel retained by the Department -- for example, to represent employees in cases of conflict of interest -- to not more than $75 per hour. A reasonable limitation on attorney's fee awards would greatly reduce the anomaly that currently exists: taxpayers presently compensate attorneys who sue the government at vastly higher rates than they pay attorneys who represent the government.

I am providing for the record, in addition to the table mentioned earlier in my testimony, three sets of tables of cases for which we have been able to gather information. One, Table B, is drawn from awards paid from the judgment fund by the General Accounting Office. The second table, Table C, sets forth awards paid in cases filed in the district court for the District of Columbia. The third, Table D, shows awards against state and local governments in reported cases. 17/ These tables reflect the great disparity in hourly rates in the cases, but indicate that a limitation of $75 per hour is a reasonable and defensible amount. Even in the District of Columbia, where legal fees would be expected to be among the highest in the country (and where a large percentage of all civil fee-shifting cases are brought), a substantial number of awards have been for no more than $75 per hour. Of course, courts and agencies would still be free to award attorneys' fees at an hourly rate lower than the $75 maximum rate.

3. The bill specifically would preclude the use of multipliers or bonuses to augment any award of attorneys' fees under any federal fee-shifting statute. As the Supreme Court noted in Blum v. Stenson, 104 S. Ct. at 1548, the "product of reasonable

---

17/ We recognize, of course, that the tables of cases presented for the record are by no means complete and do not provide in each case the most useful kinds of information, but they are as complete as our research efforts could achieve. Unfortunately, many of the cases simply do not provide specific information on such matters as the hourly rate. The General Accounting Office information is current through 1983; we were unable to gather information from the most recent active GAO files.

hours times a reasonable rate" normally provides a "reasonable" attorneys' fee within the meaning of federal fee-shifting statutes. By paying multipliers to counsel in cases they win, the courts would effectively underwrite the cases the same attorneys lose. As the Supreme Court made clear in Hensley v. Eckerhart and Ruckelshaus v. Sierra Club, attorneys' fee awards are not appropriate to compensate parties for their litigation expenses on issues they lost in litigation. Moreover, to augment the fee award when the chances of recovery are least could have the perverse effect of penalizing most those parties whose conduct is least blameworthy.

4. The bill would permit a court or agency to reduce or deny awards of attorneys' fees when the prevailing party unreasonably protracted the final resolution of the controversy, or when other specific factors make a denial or reduction of the fee award appropriate. The factors specified by the bill would not be exclusive, and courts and administrative officers should continue to consider other factors for adjusting awards in accordance with existing law. The bill would not overturn existing law that requires plaintiffs to pay defendants' attorneys' fees in certain cases.

5. The bill would establish a jurisdictional requirement that a party seeking an award of attorneys' fees submit an application for the award within 30 days of a final decision on the merits by the court or the entry of a final disposition by an administrative officer. This requirement is consistent with the jurisdictional time for filing fee applications under the Equal

Access to Justice Act. 18/ The bill would also instruct the courts and agencies to provide guidance about the information to be submitted with a fee application.

6. When a money judgment is awarded against the United States, or against a state or local government, the amount of the judgment would be reduced by the amount of attorneys' fees awarded but not by more than twenty-five percent. Because the purpose of fee-shifting statutes is to allow parties to secure reasonable representation when they otherwise could not afford it, this offset would recognize that a party may become able to pay part or all of its legal expenses from the judgment awarded in the case. We do not see why the public should subsidize parties who can bear their own legal costs.

This twenty-five percent reduction of the judgment would not apply to judgments in Equal Access to Justice Act cases under 5 U.S.C. § 504 and 28 U.S.C. §§ 2412(d), inasmuch as prevailing parties in those cases could receive attorneys' fees only if the government failed to prove that its actions were substantially justified. The reduction also would not apply in suits for recovery of disputed tax payments under 26 U.S.C. § 7430, in order to avoid inconsistent adjudications under the Internal

---

18/ The Supreme Court has recently recognized that courts can adopt procedural rules to define reasonable time limits for attorney's fee requests. White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982).

Revenue Code, 19/ or whenever the party could demonstrate that this rule would work injustice.

7. The bill would, in accordance with case law, allow recovery of attorneys' fees when a case is mooted by a change in government policy, if the party obtains substantially the relief sought and the government is unable to prove that the lawsuit was not a "material factor" in the change of policy. This provision would encourage courts not to place an undue emphasis on chronology, while preserving the right to attorneys' fees when a plaintiff's suit actually did force a favorable change in government policy.

8. The bill would deny awards of attorneys' fees and related expenses or costs for services performed by an attorney following a written offer of settlement by the United States, or by a state or local government, if the party's failure to accept the settlement was unreasonable and the party does no better in litigation after having rejected the settlement offer. This section, modeled after the provisions of Rule 68 of the Federal Rules of Civil Procedure, would benefit government and private parties in judicial and administrative proceedings by encouraging reasonable behavior by both sides in settlement negotiations.

19/ This inconsistency would result because the Internal Revenue Code gives taxpayers the choice of paying contested taxes and suing for a refund, or bringing an action in the Tax Court without advance payment. There would be a money judgment in the former case, but not in the latter. Therefore, the applicability of the 25% reduction of the judgment would hinge entirely on the choice of forum, an anomaly that would otherwise channel many more tax cases to the overburdened Tax Court.

9. The bill would apply to any award of attorneys' fees and related expenses or costs in any case or proceeding initiated subsequent to an enactment of the bill. In addition, the bill would apply to the award of attorneys' fees and related expenses or costs incurred after the enactment of the bill in actions pending at the time of enactment.

10. The bill would not create an independent right to attorneys' fees; the right to an award of attorneys' fees could be derived only from other specific federal laws. The bill also would not supersede other requirements established by law. For example, the provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1), that deny attorneys' fees to an otherwise eligible party when "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust" would continue to apply.

11. The provisions of the bill would apply to attorneys' fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a) and 28 U.S.C. § 2412(d). Although the provisions of the EAJA reflect several standards lacking in the other federal fee-shifting statutes, we perceive the need for substantial uniformity for all fee-shifting statutes. Certain exceptions from the terms of the bill would, however, be made in the case of awards under the EAJA in order to preserve the Congressional purpose to allow persons to challenge unreasonable government actions. These exceptions are justified by the different structure of the EAJA, in which attorneys' fees are recoverable in EAJA cases only when the government cannot prove that its

actions were not "substantially justified." These exceptions are spelled out in section 4(e) of the bill.

* * *

In summary, the bill would prevent the increasing number of serious abuses of federal fee-shifting statutes that have occurred in recent years. It would, however, preserve the intent of Congress to extend reasonable legal assistance to groups and individuals who need it. The bill would inject much-needed clarity into the current law of attorneys' fees. It would set an overall fee limitation that is reasonable. And it would provide long-overdue increases in Criminal Justice Act compensation levels. We feel all of these provisions -- taken as a whole -- warrant broad and bipartisan support in the Congress.

Table A

Use of Multipliers or Bonuses in Award Against Federal and States Defendants

	Case	Total Award	Base Award	Amount of Multiplier or Bonus	Multiplier as a Percentage of Base Award
A.	*Federal Defendants*				
1.	*North Slope Borough* v. *Andrus*, 515 F. Supp. 961 (D.D.C. 1981), *rev'd*, 689 F.2d 222 (1982)	$215,876.92	$129,526.15	$86,350.77	66%
2.	*Environmental Defense Fund* v. *Environmental Protection Agency*, 672 F.2d 42 (D.D.Cir. 1982)	$99,534.50	$85,884.50	$13,650.00	16%
3.	*Decker* v. *Dept. of Labor*, 564 F. Supp. 1273 (E.D. Wisc. 1983)	$66,663.19	$29,628.19	$37,035.00	125%
4.	*Richardson* v. *Jones*, 506 F.Supp. 1259 (E.D.Pa. 1981)	$12,236.84	$11,567.18	$669.66	6%
5.	*Robinson* v. *Klassen*, 553 F. Supp. 76 (E.D. Ark. 1982)	$183,788.87	$168,473.12	$15,315.75	9%
6.	*Donnell* v. *U.S.*, 682 F.2d 240 (D.C.Cir. 1982), *cert. denied*, 103 S. Ct. 1190 (1983)	$73,669.88	$49,113.88	$24,556.00	50%
7.	*Will* v. *U.S.*, 90 F.R.D. 336 (N.D.Ill. 1981)	$850,000.00	$425,000.00	$425,000.00	100%

	Case	Total Award	Base Award	Amount of Multiplier or Bonus	Multiplier as a Percentage of Base Award
8.	Powell v. Marsh, 80-2779 (E.D.Pa. 1983)	$13,750.00	$12,375.00	$1,375.00	11%
9.	Minority Employees at NASA v. Frosch, C.A. No. 74-1832 (D.D.C. 1981)	$20,240.00	$18,400.00	$1,[illegible]40.00	10%
B.	State Defendants				
1.	Greater Los Angeles Council on Deafness v. KCET, No. 78-4715R (C.D. Cal. Feb. 11, 1982)	$432,285.00	$216,142.50	$216,142.50	100%
2.	Bolden v. Pennsylvania State Police, 491 F. Supp. 958 (E.D. Pa 1980)	$151,972.50	$107,747.50	$44,225.00	41%
3.	Stenson v. Blum, 512 F. Supp. 680 (S.D.N.Y.) aff'd mem., 671 F.2d 493 (2d Cir. 1981), rev'd in part 104 S.Ct. 1541 (1984)	$118,968.00	$79,312.00	$39,656.00	50%
4.	Brewster v. Dukakis, 544 F. Supp. 1069 (D. Mass. 1982)	$371,162.77	$337,420.70	$33,742.07	10%
5.	Alexander v. Hill, 553 F. Supp. 1263 (W.D.N.C. 1983)	$29,818.75	$21,818.75	$8,000.00	37%

Case	Total Award	Base Award	Amount of Multiplier or Bonus	Multiplier as a Percentage of Base Award
6. *Imprisoned Citizens Union v. Shapp*, 473 F. Supp. 1017 (E.D. Pa 1979)	$10,374.75	$9,021.52	$1,353.23	15%
7. *Ross* v. *Saltmarsh*, 521 F. Supp. 753 (S.D.N.Y. 1981) *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982)	$277,704.25	$222,163.40	$55,540.85	25%
8. *Rajender* v. *University of Minnesota*, 546 F. Supp. 158 (D. Minn. 1982)	$1,842,037.40	$763,697.40	$1,078,340.00	141%
9. *Joseph* v. *Curtis*, No. 80-0125 (D.D.C. 1981)	$10,008.90	$9,099.00	$909.90	10%
10. *Keeler* v. *Landrieu*, 29 EPD ¶ 32,879 (N.D. Ga. 1982)	$98,854.20	$82,378.50	$16,475.70	20%
11. *Paralyzed Veterans of America* v. *Smith*, No. 79-1979 WPG (C.D. Cal. 1983)	$38,250.00	$36,625.00	$1,625.00	4.4%

Table B

GAO Disbursements For Attorneys Fees: 1981 - 1983

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
1. Zorn v. IRS, No. 80-7351	FOIA	Firm $25	$110		$110	$4,769
2. Indian Law Resource Cntr v. Dept of State, C.A. No. 82-0424 (D.C. Cir. 1982)	FOIA	Firm				$4,000
3. Powell v. Marsh, 80-2779 (E.D. Pa. 1983)	Title VII	Firm	$90/hr	1/9 = $10/hr	$100/hr	$13,750 (137.5 hrs)
4. Minority Employees at NASA v. Frosch, C.A. No. 74-1832 (D.D.C. 1981)	Title VII	Firm	$100	10%	$110	$20,240 (184 hrs)
5.. Lee v. Nicholson, No. 80-1048 (D.D.C. 1983)	Title VII	Firm				$2,000
6. Haynes v. Mark, No. 80-K-600 (D. Colo. 1983)	Title VII	Firm				$33,000
7. McKenny v. Marsh, (D.D.C. 1983)	Title VII	Firm				$13,500 (interim)
8. Zeidik v. Marsh, No. 81-2592 (D.D.C. 1983)	Title VII	Firm				$27,864 (interim)
9. Shaver v. Schweiker, No. C-81-4783 WHO (N.D. Cal. 1983)	Title VII	Firm	$75 atty (cites EAJA)	(25% time reduction)	$75	$7,256

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
10. *Hogan* v. *Pierce*, No. 79-2124 (D.D.C. 1983)	Title VII	Firm				$94,000
11. *Mackey* v. *Stetson*, No. C-C-77-124-M (WDNC 1983)	Title VII	Firm	80		80	$97,707.03
12. *Natelson* v. *GSA*, No. 81-0341 (D.D.C. 1983)	Title VII	Firm				$14,068.25 (Stipulation)
13. *Int'l Assn. Machinists and Aerospace Workers v. Donovan*, No. H-82-563 (D. Conn. 1983).	FOIA	Firm				$3,750
14. *American Friends Serv. Comm.* v. *DLA*, No. 82-2980 (E.D. Pa. 1983)	FOIA	Firm	Approx. $100		Approx. $100	$3,360 (for App. 31 hrs) (settlement)
15. *Fall* v. *FBI*, No. 82-0413 (D.D.C. 1983)	FOIA	Firm				$6,000 (settlement)
16. *Davis* v. *Warnke*, No. 77-1707 (D.D.C. 1983)	Title VII	Firm	$70 in-court $60 out-of-court			$1,050

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
17. Peyton v. Schweiker, No. 82-1374, (D.D.C. 1983)	Title VII	Firm				$7,905 (settlement)
18. Playboy v. U.S., No. 80-1172 (D.D.C. 1983)	FOIA	Firm				$78,440.24 (settlement)
19. Smartt v. Orr, No. S-3004-RAR (E.D. Cal. 1982)	Title VII	Firm				$9,000 (settlement)
20. Stokes v. Block, No. Y-02-307 (D. Md. 1983)	Title VII	Firm				$2,400 for 162 hrs (settlement)
21. Tri-County Landowners Ass'n v. Dept. Int., No. 78-1648 (D.D.C. 1982)	FOIA	Firm				$6,634.27 (settled)
22. Funkhouser v. Sec Agric., No. HM-81-2266	Title VII	Firm				$8,500 (settled)
23. Wexler v. EEOC, No. 82-1559 (D.D.C. 1983)	Title VII	Firm				$15,500 (settled)
24. Neloms v. S.W. Elec. Power Co., No. 74-613 (W.D. La. 1982)	Title VII	Firm	$50 $60 $70 (increased w/ experience)		50-60-70	$11,172.75

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
25. Stewart v. Clator Smith, No. 81-1643 (D.D.C. 1983)	Title VII	Firm				$25,321.50 (settlement)
26. ABC Home Health Services v. HHS, No. (81-1646A (N.D. Ga. 1983)	FOIA	Firm				$6,496 (settled)
27. Gibson v. INS, No. 82-0540 (SDNY 1983)	§1988	Firm				$20,500 (stipulated)
28. Guerrero v. Lehman, Nos. 78-0287 JLI and 81-0378-JLI (S.D. Cal. 1983)	Title VII	Firm				$10,000 (stipulated)
29. Sepal v. Watt, C82-235T (D. Wash. 1983)	Privacy Act	Firm				$4,300 (stipulated)
30. Zane v. U.S., Nos. 212, 213 (Cl. Ct. 1983)	Indian Claims Comm. Act 25 USC § 70 N	Firm				$200,000 (stipulated)
31. Waldrop v. USAF, No. 79-4013 (S.D. Ill. 1983)	EAJA	Firm				$5,373
32. Smith v. Smith, No. 3-82-0665-D (N.D. Tex. 1983)	Title VII	Firm				$5,000 (stipulated)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
33. *Gilday* v. *DOJ*, No. 82-0096 (D.D.C. 1983)	FOIA	Firm				$1,207.50 (settled)
34. *Free Lance Star Publish Co.* v. *SBA*, 82-0615-R (E.D. Va. 1983)	FOIA	Firm				$1,080
35. *Military Audit Project* v. *Colby*, No. 75-2103 (D.D.C. 1983)	FOIA	Firm				$10,200 (settled)
36. *Parker* v. *Lewis*, No. 79-3443 (D.D.C. 1982)	Title VII	Pro se Firm				$3,000 pro se $12,360 attys (settled)
37. *EEOC* v. *Union Camp*, No. G 79-303 CA4 (W.D. Mich. 1982)						$23,973.75
38. *Boogich* v. *Navy*, No. 81-2998 (D.D.C. 1982)	Title VII	Private	$75/hr			$6,780 (90.4 hrs + costs)
39. *Phillipi* v. *CIA*, No. 75-1265 (D.D.C. 1982)	FOIA	Private				$12,700
40. *In re Hackney*, Bankruptcy 80-00144 (1982)	IRS Code	Firm				$350

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
41. *Miami Herald* v. *SBA*, No. 79-1624-Civ-JE (S.D. Fla. 1983)	FOIA	Firm				(included in $40,000 judgment)
42. *Keeney* v. *FBI*, No. 76-396 (D. Conn. 1982)	FOIA	Firm	$50/hr			$3,500 (70 hrs)
43. *Coleman* v. *Schweiker*, (D.D.C. 1982)	Title VII	Firm				$57,671.25 (settled)
44. *Siegel* v. *U.S.*, No. 78-2906 (SDNY 1982)	Title VII	Firm				$33,000 (settled)
45. *Ferris* v. *IRS*, No. 81-0383 (D.D.C. 1982)	FOIA	Firm				$2,800 (settled)
46. *Moss* v. *Orr*, No. J80-0322(R) (S.D. Miss 1982)	Title VII	Firm				Included in $34,000 consent decree
47. *Poarch* v. *Adams*, No. 78-2-1024 (D. Colo. 1981)	Title VII	Private	$65/hr $75/hr (same attorney)		$65 $75	$16,179.50
48. *Arthur* v. *Malone*, No. N-81-218 (D. Md. 1982)	Rehab. 29 USC § 794(a)	Private				$5,500 (settled)
49. *Mangiapane* v. *Lewis*, No. 75-1239 (D.D.C. 1982)	Title VII	Private	(a) ? (b) 70/hr		70	(a) $21,000 (settled) (b) $8,428 (earlier award)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
50. Luevano v. Campbell, No.79-0271 (D.D.C. 1982)	Title VII	2 Private firms 6 public interest groups				Consent order $265,962
51. EDF v. EPA, No. 82-0362 (D.D.C. 1982)	FOIA	Firm				$3,833.13 (settlement)
52. Nat'l Treasury Employees' Union v. Dep't Treas, No. 76-1404 (D.D.C. 1982)	Privacy Act	Firm	$30/hr $35/hr	(Court halved fee request of $60 + $70/hr	$30 $35	$3,833.13
53. U.S. v. Slobov, No. 80-3800 (6th Cir. 1982)	§ 1988	Firm	$25,000 requested			$8,000
54. EEOC v. Pierce Packing Co., No. 77-27- BLG (D. Mont. 1982)	Title VII ?	Firms				$21,404.15 to Company $5,212.50 to Union
55. NRDC v. Watt, No. 80-1935 (D.C. Cir. 1982)	§ 43 USC § 1349 (a) (5)	Public interest (NRDC, Sierra Club, etc.)				$35,000

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
56. Williams v. Smith, No. 74-186 (D.D.C. 1981)	Title VII ?	Firm				$60,000 (settlement)
57. Saunders v. Navy, No. C-80-3832 WHO (N.D. Cal. 1982)	Title VII	(a) Firm (b) Legal Aid Soc. (c) Firm (d) Firm				(a) $2,500 (order) Stipulation: (b) $540,831.59 (c) $37,917.34 (d) $85,394.77
58. Long v. IRS, No. C 77-640V (W.D. Wash. 1980)	FOIA	Firm				$26,698.29 (stipulated)
59. Joseph v. Curtis, No. 80-0125 (D.D.C. 1981)	Title VII (?)	Firm	70.00 100.00 (two attys)	10%	$77/hr $110/hr	$10,008.90
60. Hobbs v. Schweiker, No. 76-2354 (D.D.C. 1982)	Title VII	Firm				$16,311.50
61. Garnes v. Pauken, No. 76-0974 (D.D.C. 1982)	Title VII (?)	Firm	$100/hr		$100/hr	$22,504
62. Long v. IRS, No. C-77-650 (W.D. Wash. 1982)	FOIA	Firm		20.62 hrs.		$1,631.94 (stipulation)
63. Hoffman v. Donovan, No. 80-1351 (D.D.C. 1982)	FOIA	Firm				$2,250 (settlement)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
64. Weiss v. Marsh, C.A. No. 81-65-S (M.D. Ala. 1983)	Title	private VII	$75			$32,109
65. Mundy v. Weinberger, C.A. No. 80-2096 (D.D.C. 1983)	Back Pay Act	private firm				$35,559.93 (settlement)
66. Hawkins v. CIA, C.A. No. 79-2306-EFC (N.D. Cal. 1983)	FOIA	private counsel				$18,000 (settlement)
67. Perry v. Block, C.A. No. 80-1487 (1983)	Title VII	private counsel				$4,397.54 (settlement)
68. Turch v. SEC, No. 82-CV-1138 (NDNY 1983)	FOIA	private counsel				$1866.84
69. Kemp v. Williams, No. 77-2014 (D.D.C. 1983)	Title VII	private counsel				$16,500 (with costs)
70. Wright v. Weinberger, C.A. No. 82-0813 (E.D. Pa. 1983)	Title VII	private counsel				$8,743 (with costs)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
71. Randlett v. Harris, C.A. No. 80-K-754 (D. Colo. 1982)	Title VII	private counsel				$6,680.05 (w/costs)
72. Keeler v. Landrieu, 29 EPD ¶ 32,879 (N.D. Ga. 1982)	Title VII	private counsel	$45-85	20%		$98,854.20
73. College Heights Prop Owners Assn. v. EPA, C.A. No. 82-373-C (WDNY 1982)	FOIA	private counsel				$329.87
74. Darden v. EEOC, C.A. No. 81-3045, (D. Md. 1982)	Title VII	private firm				$18,138.98 (w/costs)
75. Lang v. Lewis, C.A. No. F-81-243 (N.D. Ind. 1982)	Title VII	private firm				$9,000
76. Snead v. Schweiker, C.A. 72-2191 (D.D.C. 1982)	Title VII	private counsel	$80/hr	1.25	$100.00	$2,673.40 (w/costs)
77. Turbeville v. Casey, No. 81-1058-A (E.D. Va. 1982)	Title VII	firm				$6,300.72 (settlement)
78. Letelier v. DOJ, No. 79-1984 (D.D.C. 1982)	FOIA	private firm				$9,369.95 (w/costs) (settlement)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
79. Guidry v. Alexander, No. 78-39-RE Nos. 82-3098 and 82-3119, (D. Ore. 1982)	Title VII	private				$22,117.38 (settlement)
80. Florida Power & Light Co. v. Costle, No. 80-5314 (5th Cir. 1981)	Clean Air Act	private				$36,830.50 (w/costs)
81. Taylor v. Jones, No. CR-C-76-90 (E.D. Ark 1982)	?	private				$12,268.72 (w/costs)
82. McCoy v. Schweiker, No. 81-338, (D. Md. 1982)	Title VII	private firm				$1,000
83. Fulks v. U.S., No. 78-2529 (N.D. Cal. 1982)	Swine Flu	private firm				$5,600
84. Wommack v. U.S., M-80-105-CA (E.D. Tex. 1983)	FOIA	private counsel				$1,469.81 (settlement)
85. Velez v. Devine, No. 81-1225, (D.D.C. 1982)	Title VII	private firm				$2,251.07 (w/costs)
86. Martin v. MSPB, No. 81-2471 (D.D.C. 1982)	FOIA	private				$1,220

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
87. Scherer v. Ripley, No. 77-1856, (D.D.C. 1982)	?	private				$15,145.84 (w/costs)
88. Heights County Congress v. VA, No. 80-52 (N.D. Okla. 1982)	FOIA	private				$5,000
89. Miller v. CIA, No. 77-1029 (D.D.C. 1982)	FOIA	private				$9,975
90. Fund for Constitutional Govt. v. Nat'l Archives and Records Service, No. 82-1513 (D.C. Cir. 1982)	FOIA	private				$10,478.38 (w/costs)
91. McGlathery v. Frosch, CA 78-M-5065-NE, (N.D. Ala. 1982)		Title VII	private			$8,778.97 (w/costs)
92. Nat'l Treasury Employee's Union v. Customs, No. 79-1208, (D.D.C. 1982)	?	private				$1,750
93. McIntyre v. GSA, No. 81-1355, (D.D.C. 1982)	?	private				$1,770

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
94. Mendoza v. Treasury, CV 78-3347-AWT (C.D. Cal. 1981)	FOIA.	private	$75/hr $50/hr			$2,687.50 (settlement)
95. Nakshian v. Lehman, No. 79-1833 (D.D.C. 1982)	ADEA	private				$6,809.35 (settlement)
96. Del. Carmen v. Boorstin, C.A. No. 81-1524 (D.D.C. 1982)	Title VII	private	$75			$748.50 (62.2 hrs)
97. Recker v. Bell, C.A. No. 83-1095 (D.D.C. 1983)	Title VII	private				$3,500 (settlement)
98. Ackerman v. Bell, C.A. No. 82-1367 (D.D.C. 1983)	Title VII	private				$3,300
99. Holt v. Schweiker, C.A. No. 82-1910 (E.D. Pa. 1983)	social security	private				$1,032
100. Green v. U.S., C.A. 80-PT-5198-NE	29 USC § 794a	private				$2,060

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
101 Pacific Legal Foundation v. Council on Environmental Quality, C.A. No. 79-116	Sun-Shine Act	private				$31,929.20
102 Alexander v. U.S.,	29 USC §§ 207, 216	private				$16,250
103 Dodgins v. Secretary, HHS Services,		private	25%			$5,166.60 (for 76 hrs)
104 Union of Concerned Scientists v. U.S. Nuclear Reg. Comm.,		private				$2,800
105 McLaughlin v. Alexander		private				$6,300
106 Miller v. Staats,		(a) private (b) private (c) private (d) public int group				(a) $5,737.19 (b) $3,734.55 (c) $30,060.80 (d) $52,945.55
107 Hackly v. Max Cleland,		private				$86,034.43

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
108 Howard v. Donovan	42 USC § 2000	private				$13,357
109 Queen v. U.S.,	F.R.C.P. 54(d)	private				$609
110 Kreysa v. Regan,	Title VII	private				$47,326
111 Lund v. V.A.,	FOIA					$750
112 Shea v. United States, No. 81 C 5997 (N.D. Ill. 1983)	28 USC § 2412	private firm				$3,075
113 Paralyzed Veterans of America v. Smith, No. 79-1979 WPG (C.D. Cal. 1983)	Rehab. Act	private counsel public interest	(a) $200 (b) $150 to recover attys' fees) (c) (d) $150 (e) $150	$2,200 lodestar $6,375, lodestar plus $1,625 bonus		(a) $3,000 (b) $8,000 (c) $12,750 (d) $6,500 (e) $8,000
114 Souther v. Navy, No. 80-0184 (D.D.C. 1983)	Title VII	private counsel				$25,000
115 Paz v. Smith, No. 81-2029 (D.D.C. 1983)	Title VII	private counsel				$5,188

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
116 Veterans Education Project v. Air Force, 515 F. Supp. 993 (D.D.C. 1981), aff'd mem., 679 F.2d 263 (D.C. Cir. 1982)	FOIA	private counsel	$25-110			$67,148.12
117 National Assn of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192 (D.D.C. 1983)	FOIA	National Veterans Law Center				$51,000 (includes costs)
118 Hough v. U.S., No. 80-470 (W.D Mich. 1983)	Swine Flu Act	private counsel				$42,122.14
119 Leverett v. Federal Law Enforcement Training Center, No. 280-136 (S.D. Ga. 1983)	FOIA	private counsel				$23,000
120 Crape v. U.S. Dept. of Ag., 81-C-261 (E.D. Wis. 1983)	Title VII	private counsel				$15,500

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
121 *Hoopa Valley Tribe* v. *Watt*, No. C-81-3094 MHP (N.D. Cal. 1983)	EAJA	$92.50 97.90 principal attys $38.10 $15.00 grad student				$19,362.04
122 *Thomas* v. *Grinstead*, (1983)	Title VII	private firm				$9,308.10 (includes costs)
123 *Britton* v. *McPherson*, No. 82-1436 (D.D.C. 1983)	Title VII	private counsel				$2,000 (includes costs- (settlement)
124 *Britton* v. *Agency for International Development*, No. 80-2657 (D.D.C. 1982)	FOIA	private counsel	(a) $85 partner (b) $60 co-counsel			$2,378
125 *Ellsberg* v. *CIA*, No. 79-2 799 (D.D.C. 1983)	FOIA	private firm				$2583.50 (includes costs)
126 *Devereux* v. *FBI*, Civil Action No. 81-705 PHX-VAC (RCG)	FOIA	private firm				$14,225
127 *Garcia* v. *INS*, Action No. 82-F-680 (D. Colo. 1983)	EAJA	private firm				$6,000 (settlement)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
129 Bevc v. Department of State, No. C79-2787-MHP (N.D. Cal. 1982)	FOIA	pro se and private firm				$8,870 (settlement)
130 Mendoza v. INS, No. EP-82-CA-76 (W.D. Tex/ 1983)	28 USC § 2201-2202	El Paso Legal Assistance Society & private counsel				(a) $5,450 (b) $6,750 (c) $2,680 (d) $2,490 (e) $1,475 (f) $1,200
131 Porter v. Miller, No. 80-126 (D.D.C. 1983)	Title VII	private firm	$65 associate $75 partner			$12,104
132 Hoska v. Department of Army, No. 81-1352 (D.C. Cir. 1983)	Back Pay Act and EAJA	private firm				$5,518.13
133 Smith v. Schweiker, No. 76-2311 D.D.C. 1983)	Title VII	private firm				(a) $2406.56 (includes costs - settlement)
134 Epps v. Ripley, No. 81-0588 (D.D.C. 1983)	Title VII	private counsel				$13,500
135 Harman v. Baldridge, No. IP 82-2141C (S.D. Ind. 1983)	FOIA	private firm				$500

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
136 Quirindongo v. Crosland, No. 81-315-TUC-ACM (D. Ariz. 1983)	Title VII	private firm	$85			$8,032.50
137 Chewning v. Edwards, No. 76-334 (D.D.C. 1983)	Title VII	private counsel			interim awards	(a) $45,000 (b) $88,457 (c) $102,350 (d) $79,734.92
138 Jordan v. DOJ, 691 F.2d 514, (D.C. Cir. 1982)	FOIA	law student & prof				$22,610.58 (includes costs)
139 Fraser v. United States, C.A. No. C-75-284 (E.D. Wash. 1982)	Title VII	private counsel				$8,333 (settlement)
140 Andres v. C.I.A., C.A. No. 80-0865 (D.D.C. 1983)	FOIA	private counsel				$8,410.45 (includes costs-(settlement)
141 Johnson v. Bond, C.A. No. 80-C-0080 (N.D. Ill. 1983)	Title VII	private firm				$2,499.99 (settlement)
142 Fancher v. Nimono, No. LR-C-79-541 (W.D. Ark. 1983)	Title VII	private firm	$25 (law clerk)			$13,207.50
143 EEOC v. Detroit Edison, C.A. No. 80-73587 (E.D. Mich. 1982)	Title VII (?)	In-house	$29 (lead atty) $14.50 (atty)			$9,696.43 paid by EEOC for frivolous suit)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
144 Green v. Dept. of Commerce, No. 77-0363 (D.D.C. 1982)	FOIA	private counsel				$20,000 (includes costs- (settlement)
145 Hornick v. Marsh, C.A. No. 82-0630 (D.D.C. 1982)	Title VII (?)	private counsel				$2,570 (includes costs- (settlement)
146 Patterson v. Marsh, C.A. No. CV 80-H-1617-E (N.D. Ala. 1982)	Title VII (?)	private counsel				$1,500 (settlement)
147 Whitlow v. Dept. of Navy, CA No. IP82-790-C (S.D. Ind. 1982)	FOIA	private firm				$2,500 (includes costs- (settlement)
148 Phillips v. Orr, C.A. No. 81-Z-492 (D. Colo. 1982)	Title VII	private counsel				$3,000
149 Stevenson v. Secretary of Air Force, C.A. No. CIV-80-943-D (W.D. Okla. 1982)	Title VII	private counsel	$75			$4,500
150 National Wildlife Federation v. Watt, C.A. No. 82-0320	(environmental)	private firm				$27,250 (settlement)

Case Name and Cite	Statute	Attorney	Base Rate	Multiplier	Effective Rate	Total Award
151 Watch v. Harris, C.A. No. H-78-539 (D. Conn. 1981)	(environmental)					$19,419.70
152 EEOC v. Shoney's, C.A. NO. 81-G-0S09-S	Title VII	private firm	$90 partner $70 sr. assoc. $40-45 (associates)			$18,430.39 (paid by EEOC for frivolous suit)
153 Lopez v. Crosland, C.A. No. 70-1707-E (S.D. Cal. 1982)	Title VII	Legal Defense Fund & private firm				(a) $12,839.25 (b) $20,460 (includes costs)
154 Beck v. Chasen, C.A. No. 80-1310 CIV-T-WC (M.D. Fla. 1982)	Title VII	NTEU Legal Services Fund				$5,670.66 (includes costs)

Table C

Attorney Fee Awards For Cases Adjudicated Before the U.S. District Court For The District of Columbia

ATTORNEYS FEES

TITLE	HOURLY RATE	CASE TYPE
*Vaughn v. Rosen, No. 73-1039 (D.C. Cir. 1973)	$85	FOIA
Smith v. Kleindienst, 1-10 (p. 651), 8 FEP 752 (D.D.C. 1974)	$40-$75	Title VII
Communist Party of the United States v. Department of Justice, No. 75-1770 (D.D.C. 1976)	$45	FOIA
Parker v. Matthews, 411 F. Supp. 1059 (1976), aff'd 561 F.2d 320 (D.C. Cir. 1977)	$30-$60	Title VII
Pealo v. Farmers Home Adm., 412 F. Supp. 561 (1976)	$50-$60	Housing
Rucker v. Matthews, No. 75-0531 (D.D.C. 1976)	$58.05 (average)	Title VII
Weahkee v. Perry, 16 FEP 755 (D.D.C. 1976)	$60	Title VII
Walden v. Boorstin, 16 FEP 1739 (D.D.C. 1976)	$50	Title VII
Williams v. Saxbe, 17 FEP 1657 (D.D.C. 1976)	$30-$65	Title VII
Zeldin v. Hoffman, No. 75-1913 (D.D.C. 1976)	$40	FOIA
Anderson v. Treasury, et al., No. 76-1404 (D.D.C. 1977)	Not based on hourly rate (awarded $2,000)	PA
The Founding Church of Scientology of Washington, D.C., Inc. v. Marshall, 439 F. Supp. 1267 (1977)	$60	FOIA
Copeland v. Usery, 14 FEP 1677 (D.D.C. 1977)	$57.17 (average)	Title VII
Pace v. Califano, No. 76-99 (D.D.C. 1977)	$52-$54	Title VII
*In Re Ampicillin Antitrust, Litigation MDL. No. 50, Misc. No. 45-70 (D.D.C. 1978)	$40-$200	Other

TITLE	HOURLY RATE	CASE TYPE
Cayce v. Adams, 18 FEP 465 (D.D.C. 1978)	$40-$75	Title VII
*Copeland v. Marshall, No. 77-1351 (D.D.C. 1978)	$51.65	Title VII
Kinsey v. Legg Mason Wood Walker, No. 71-1338 (D.D.C. 1978), aff'd No. 78-1994 (D.C. Cir. 1979)	$20-$65 Period of 1971-1978	Title VII
Parker v. Califano, 443 F. Supp. 789 (1978)	$35-$72	Title VII
Postow v. Oriental Bldg. Ass'n, 455 F. Supp. 781 (1978)	$60-$75	Other
Stephenson v. Simon, 448 F. Supp. 708 (1978)	$60	Title VII
American Broadcasting Companies Inc., et al. v. Department of Labor, et al., No. 78-1711 (D.D.C. 1979)	$55-$75	FOIA
Crocker v. Department of State, No. 79-1820 (D.D.C. 1979)	$5 (Prisoner)	FOIA
Jones v. United States Secret Service, et al., No. 78-0891 (D.D.C. 1979)	$10 PRO SE	FOIA
Marimont v. Califano, No. 1992-73 (D.D.C. 1979)	$50-$85	Title VII
Public Citizen Health Research Group v. Department of Labor, No. 76-887 (D.D.C. 1979)	$55	FOIA
Sonnenberg v. Adams, 18 Emp. Prac. Dec. 8875 (D.D.C. 1979)	$50	Title VII
Ward v. Postal Rate Commission, No. 77-0145 (D.D.C. 1979)	$50-$75	FOIA/PA
Williams v. Boorstin, No. 78-2408 (D.D.C. 1979)	$75	Title VII
Wolfson v. Department of Justice, No. 75-1714 (D.D.C. 1979)	$60-$75	FOIA

TITLE	HOURLY RATE	CASE TYPE
Jones v. Trailways Corporation, No. 78-1327 (D.D.C. 1980), 33 FEP 394	$75	Title VII
Williams v. Civiletti, et al., No. 74-0186 (D.D.C. 1980); Vacated (D.C. Cir. 1981)	$30-$85	Title VII
American Jewish Congress v. Kreps, No. 75-1541 (D.D.C. 1981)	$40-$75	FOIA
Bachman v. Pertschuk, No. 76-0079 (D.D.C. 1981)	$70-$100	Civil Rights
Blake v. Hoston, 513 F. Supp. 663 (D.D.C. 1981)	$40-$75 for period of 1976-1978	Title VII
Caton v. Barry, No. 80-1584 (D.D.C. 1981) Amended June 9, 1981	$50-$100	Other
Donnell v. United States of America, No. 78-0392 (D.D.C. 1981)	$40-$60	Voting Rights
Fells v. Brooks, No. 80-2981 (D.D.C. 1981)	$75	Other
Garnes v. Brown, No. 76-0974 (D.D.C. 1981); Deft's motion for partial reconsideration denied (2/23/82); Pltf's motion for relief from judgment granted in the amount of $22,504 (3/30/82)	$60-$100	Title VII
Green v. Department of Commerce, No. 77-0363 (D.D.C. 1981), Remanded No. 81-1791 (D.C. Cir. 1982)	$45-$95	FOIA
Indian Law Resource Center v. Department of the Interior, No. 79-0540 (D.D.C. 1981)	$70 (average)	FOIA
In Re: Ampicillin Antitrust Litigation, 526 F. Supp. 494 (1981)	$55 (average)	Other

TITLE	HOURLY RATE	CASE TYPE
In Re: Swine Flu Immunization Products Liability Litigation, MDL No. 330, Misc. No. 78-0040 (D.D.C. 1981)	$40-$75	Swine Flu
Kaplan v. Hirsch, No. 80-2898 (D.D.C. 1981)	Not based on hourly rate (awarded $1,500)	Contract
Kemp v. Williams, No. 77-2014 (D.D.C. 1981); Vacated and Remanded No. 81-1838 (D.C. Cir. 1982); Consent Order 1/5/83	$45-$60	Title VII
Konvha v. Dime Company, Inc., et al., No. 81-1149 (D.D.C. 1981)	Not based on hourly rate (awarded $1,487.50)	Other
Lawrence v. Franklin Investment Co., Inc., et al., No. 78-0919 (D.D.C. 1981)	$75	Other
Mangiapane v. Secretary of Transportation, No. 75-1239 (D.D.C. 1981)	$70	Title VII
Metropolitan Washington Coalition of Clean Air, et al. v. District of Columbia, Nos. 73-1424, 73-1644 (D.D.C. 1981)	$40-$175	Other
National Ass'n. of Concerned Veterans v. Secretary of Defense, No. 79-0212 (D.D.C. 1981), Remanded 675 F. 2d 1319 (1982)	$85	FOIA
North Slope Borough, et al. v. Cecil D. Andrus, et al.; National Wildlife Federation v. Cecil D. Andrus, et al; Village of Kaktovik, et al. v. Cecil D. Andrus, et al; 515 F. Supp. 961 (1981), Motion for Partial Reconsideration Denied, May 29, 1981	$45-$125	Other
Parker v. Lewis, No. 79-3443 (D.D.C. 1981); Remanded No. 81-1965 (D.C. Cir. 1982); Stipulation of Settlement and Dismissal 11/9/82 ($12,360.15)	$50 (pro se representation) $50-$138 (Attorneys)	Title VII

TITLE	HOURLY RATE	CASE TYPE
Quinto v. Legal Times of Washington, Inc., et al., 511 F. Supp. 579 (1981)	$5 law student (pro se)	Other
Smith v. Schweiker, No. 76-2311 (D.D.C. 1981); Amended No. 81-1860 (D.C. Cir. 1982) ($12,046.90 total)	$55-$65 ($9,988.25 total)	Title VII
Snead v. Harris, No. 77-2191 (D.D.C. 1/30/81) 33 FEP 397; 7/30/82	$80 $95	Title VII
Veterans Education Project v. Secretary of the Air Force, et al., 515 F. Supp. 993 (1981); Remanded No. 81-1741 (D.C. Cir. 1982)	$25-$110	FOIA
Welchel v. Lewis, No. 78-0514 (D.D.C. 1981)	$65-$85	Title VII/ Equal Pay Act
Breen v. Tucker, No. 78-2222; Breen v. District of Columbia, et al., No. 80-0709 (D.D.C. 1981) --Stipulation filed 10/29/81 for additional fees $289.47; Stipulation filed 7/30/82 for additional fees $574.84	$90	Title VII
Crowley v. Haig, No. 74-0494 (D.D.C. 1981)--9/25/81 Opinion 12/9/81 Opinion Reversed Nos. 81-2213 and 81-2352 aff'd No. 82-1007 (D.C. Cir. 1983)	$40-$148.28 $60-$148	Personnel Action/Back Pay Defensive fee Litigation discovery
Davis v. Warnke, No. 77-1707 (D.D.C. 1981)	$60 (non-court time)	Civil Rights
Chicago Title Insurance Company v. Kern, No. 80-3174 (D.D.C. 1981)	Not based on hourly rate (awarded $1,664)	Other
Shaw v. Library of Congress, No. 79-0325 (D.D.C. 1981)	$85	Title VII
Smith v. Navy, 78-0953, (D.D.C. 1981)	$75	Title VII

TITLE	HOURLY RATE	CASE TYPE
Pearch v. Pierce, No. 79-1651 (D.D.C. 1981)	$65	Title VII
Vines, et al. v. Hodges, et al., No. 75-1211 (D.D.C. 1981)	$40-$55	Other
Gee v. Boorstin, No. 77-1628 (D.D.C. 1981)	Not based on hourly rate (awarded $21,182.25)	Title VII
Valdez v. Ink, No. 80-0114 (D.D.C. 1981)	$60-$75	Equal Pay
Proctor v. Woodson, No. 79-0155 (D.D.C. 1981)	$65	Title VII
Bright v. Butler, No. 80-2401 (D.D.C. 1981); aff'd No. 82-1113 (D.C. Cir. 1982)	$60	Title VII
Harris v. District of Columbia Board of Education, et al., No. 81-1842 (D.D.C. 1981)	$65-$75	Other
Davis v. Bolger, 512 F. Supp. 61 (1981)	$70	Title VII
Stimpert v. Lewis, No. 79-1336 (D.D.C. 1981)	$50-$75	Equal Pay
Thompson v. Turner, No. 79-1565 (D.D.C. 1981)	$60-$80	Title VII
Roberts v. Solomon, No. 77-2188 (D.D.C. 1981)	$20-$100	Title VII
Jarrett v. Adams, No. 76-1824 (D.D.C. 1982).	$64-$85	Title VII
Means v. D.C. Board of Education, No. 78-2402 (D.D.C. 1982)	$65 through 1979 $75 thereafter	Other
Patsel v. District of Columbia Board of Education, 530 F. Supp. 660 (1982)	$80	Other
Davis v. District of Columbia Board of Education, 530 F. Supp. 1215 (1982)	$80	Other

TITLE	HOURLY RATE	CASE TYPE
Foster v. District of Columbia Board of Education, No. 82-0095 (D.C. 1982)	$80	Other
Lopez v. Rodriguez, No. 79-3102 (D.D.C. 1982)	Not based on hourly rate (awarded $22,000)	Other
Fells v. District of Columbia Education, No. 81-0821 (D.D.C. 1982)	Not based on hourly rate (awarded $1,290)	Other
Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (1982)	$75	EAJA
International Brotherhood of Painters and Allied Trades Union and Industry National Pension, et al. v. J&J Paint and Glass, No. 82-0902 (D.D.C. 1982)	Not based on hourly rate (awarded $482.60	Other
Environmental Defense Fund, Inc. v. EPA, 672 F. 2d 42 (1982)	$55-$110 Supp. Fee Application--$110	Other
Alabama Power Company v. Gorsuch, 672 F.2d 1 (1982)	$48	Other
Smalls v. District of Columbia Education, No. 81-0664 (D.D.C.)	$75	Other
Towell v. District of Columbia Board of Education, No. 81-0868 (D.D.C. 1982)	$75	Other
Warren v. District of Columbia Board of Education, No. 80-1841 (D.D.C. 1982)	$75	Other
Fund for Constitutional v. Government National Archives and Records Service, No. 76-1820 (D.D.C. 1982)	$45-$100	FOIA
Johnson v. District of Columbia Board of Education, No. 80-0897 (D.D.C. 1982)	$75	Other
Murray v. Weinberger, No. 75-2145 (D.D.C. 1982)	$45-$75	Title VII
Northwest Airlines, Inc. v. EEOC, No. 80-2192 (D.D.C. 1982)	$75-$110	FOIA/Title VII

TITLE	HOURLY RATE	CASE TYPE
Hobbs v. Schweiker, No. 76-2354 (D.D.C. 1982)	$65-$85	Title VII
Hoska v. Department of the Army, 694 F.2d (1982)--Remanded to MSPB re: amount of attorney fees for administrative appeal	$67.50 (Judicial Review)	EAJA
Sierra Club v. Gorsuch, 684 F.2d 972 (1982)	$110	Other
Del Manufacturing Company v. United States of America, No. 82-0153 (D.D.C. 1982)	$75	EAJA
Sahni v. Barry, No. 81-1215 (D.D.C. 1982)	$75	Other
NAACP, et al. v. Donovan, 554 F. Supp. 715 (1982)	$60-$75 (attys) $25-$35 (paralegals & summer assoc.)	EAJA
Del Carmen v. Boorstin, No. 81-1524 (D.D.C. 1982)	$75	Title VII
National Treasury Employees Union v. Department of the Treasury, No. 76-1404 (D.D.C. 1982)	$60-$70	Other
Bundy v. Jackson, No. 77-1359 (D.D.C. 1982); Vacated 10/12/82	$65-$100	Other
Zorn v. IRS, No. 80-2351 (D.D.C. 1982)(Additional $35 awarded to cover 1 hr. spent by plaintiff's counsel in preparing reply to defendant's memo on fees and expenses)	$110	FOIA
Morgan v. Barry, No. 81-1419 (D.D.C. 1983)	$55-$75	Other
Porter v. Miller, No. 80-0126 (D.D.C. 1983)	$65-$75	Title VII
Corley v. The Hecht Company, et al., No. 79-2474 (D.D.C. 1983)	$75-$125	Other

TITLE	HOURLY RATE	CASE TYPE
Connors v. Drivers, Chauffeurs and Helpers Local Union No. 639, et al., No. 82-1840 (D.D.C. 1983) --Supplemental Motion granted April 11, 1983	$80-$190	Other
Acosta v. The University of the District of Columbia, et al., No. 80-1267 (D.D.C. 1983)	$65-$115	Title VII/ Race and National Origin
Bellefonte Insurance Company v. Ronald K. Gaines, et al. No. 82-0748 (D.D.C. 1983)	$60	Other
Murray v. Weinberger, No. 75-2145 (D.D.C. 1983)--additional fees awarded (See 2/11/82 Opinion issued in this action)	$55-$100	Title VII
Weisberg v. FBI, Nos. 78-0322 and 78-0420 (D.D.C. 1983)	$53	Other
Des Moines Register and Tribune Company and Tom Knudson v. Department of Justice, et al., 563 F. Supp. 82 (1983)	$35 in-house counsel $75 outside counsel	FOIA
Citizen's Coordinating Committee on Friendship Heights, Inc., et al. v. Washington Metropolitan Area Transit Authority, 568 F. Supp. 825 (1983)	$75-$110	Other
National Geographic Society v. 3A Editores, S.A., No. 80-1684 (D.D.C. 1983)	Not based on hourly rate (awarded $7,874.66 fees & costs--Defendant's counsel personally liable for $1,500 of the above-mentioned total.)	Other
Aero Corporation v. Department of the Navy, No. 79-2944 (D.D.C. 1983)(SEE Memo in support of attys fees award)	$55-$142	Govt. Contract

TITLE	HOURLY RATE	CASE TYPE
Mary Roe and John Doe v. Lifespring, Inc., et al., No. 81-3215 (D.D.C. 1983)	$75	Other
Metrocare, et al. v. Washington Metropolitan Area Transit Authority, No. 78-1003 (D.D.C. 1983)	$75-$150	Title VII
Childress v. Washington Metropolitan Area Transit Authority, No. 82-2766 (D.D.C. 1983)(SEE Documentation in support of award of costs and attorneys fees)	$100	Other
United States for the use and benefit of Eastern Foundation Co., Inc. v. Blake Construction Company, Inc., No. 66-3371 (D.D.C. 1983)	$12,944 for efforts in Ct. Cl.	Contract-Indemnity Clause
Bachman, et al. v. Miller, et al., 567 F. Supp. 317 (1983)	$40-$135	Title VII/ Race
Laffey, et al. v. Northwest Airlines, Inc., 572 F. Supp. 354 (1983) Order correcting fee opinion 8/4/83	$75-$175	Title VII
Arnold v. Commerce, No. 81-1968 (D.D.C. 1983)	$90-$110	Title VII/ Race
Impro Products, Inc. v. Block, 569 F. Supp. 1389 (1983)	$23-$83	EAJA
Commonwealth of Puerto Rico v. Heckler, No. 82-2695 (D.D.C. 1983)	Not based on hourly rate (awarded $12,500)	Other
Blitz v. Donovan, No. 82-0706 (D.D.C. 1983)	$75	EAJA
Environmental Defense Fund, Inc. v. EPA, et al., No. 82-1346 (D.C. Cir. 1983)	Not based on hourly rate ($6,102.19)	EAJA
Wolfe v. Department of Health and Human Services, No. 80-1753 (D.D.C. 1983)	$3315 (63.5 hrs.)	FOIA

TITLE	HOURLY RATE	CASE TYPE
Turgeon v. Howard University, No. 81-2973 (D.D.C. 1983), 33 FEP 389	$95-$150	Title VII
O'Brien v. Love, et al., No. 81-1120 (D.D.C. 1983)	$65 (attorney was held personnally	Discovery Sanctions/ Nongovt.
Krodel v. Young, 576 F. Supp. 390 (1983)	$65-$80	ADEA
Donovan v. Goldstein, et al., No. 83-0940; Crawford, et al. v. La Boucherie Bernard, Ltd., et al., No. 83-0750 (D.D.C. 1984) (Interim Award of Fees)	$75 for all attorneys and law clerks, irrespective of experience or skill.	Other
Arrington, et al. v. National Broadcasting Company, Inc., No. 81-2019 (D.D.C. 1984)	$110 attorney $30 paralegal (certified legal assistant and law student)	Other Nongov't (labor law)
Rhinehart, et al. v. Bureau of Indian Affairs, et al., No. 78-2472 (D.D.C. 1984)	$8,000 (ct. reduced requested fee award-- $20,741.25 for failure to document hours)	EAJA
American Academy of Pediatrics, et al. v. Heckler 580 F. Supp. 436 (1984)	$75 $10 paralegal/ Law clerk	EAJA
Ashton, et al. v. Pierce, et al., 580 F. Supp. 440 (1984)	$9-$11 paralegal/Law clerk $48,500 Dct. work $24,000 court of appeals work (reduced total # of hrs. expended)	EAJA
Parker v. Boorstin, No. 82-3513 (D.D.C. 1984) (fees awarded to govt.)	$1,001.231	Title VII
Parker v. Boorstein, No. 82-3102 (D.D.C. 1984) (fees awarded to govt.)	$745.15	Title VII

TITLE	HOURLY RATE	CASE TITLE
Garber, et al v. Randell, No. 2405-72, 2406-72; Natale v. Randell, No. 2407-72 (D.D.C. 1984)	$5,657,006.37	Other/ Class action (Securities fraud)
Planells v. Howard University, No. 81-2973 (D.D.C. 1984)	$75-$105 $40 (law clerks)	Title VII
Carter v. Duncan-Huggins, Ltd., No. 81-0546 (D.D.C. 1984)	$85 Trial Preparation $125 Trial	Title VII Nongovt.
Ahrens v. OPM, No. 81-0338 (D.D.C. 1984)	$4,805 Attorney & Paralegal time $1,125 Supp. App. for fees & expenses	EAJA
Thompson v. Sawyer, No. 74-1101 35 FEP 1327 (1984) (fees against unsuccessful intervenor)	$60-$150 $45 lawclerk	Title VII Nongovt.
Kay v. Fowler, et al., NO. 83-1876 (D.D.C. 1984)	$75 $30 lawclerk	Other/ Nongovt.
Connolly v. Heckler, No. 82-2917 (D.D.C. 1984)	$75	EAJA
Freeman v. Dole, et al., No. 76-1587 (D.D.C. 1984)	$125 partner $85 associate $35 Senior law clerk $25 Junior law clerk $15 paralegal	Title VII
Wichita and Affiliated Tribes of Oklahoma v. Clark, et al., No. 83-0602 (D.D.C. 1984)	$90-$125	Other/ Sanctions
Hawkins v. Dolphin and Evans Title Insurance Agency, Inc., No. 83-2254 (D.D.C. 1984)	$100	Other
Natural Resources Defense Council, et al. v. EPA, Nos. 75-1698, 2153-73, 75-1267, 75-172 (D.D.C. 1984)	$40-$100	Other

TITLE	HOURLY RATE	CASE TITLE
Carter v. Duncan - Huggins Ltd., No. 81-0546 (D.D.C. 1984) (See other opinion dated 4/19/84 re fees for counsel's pretrial and trial work)	$85 Post-trial and appellate $125 appellate oral argument	Title VII/ Race
Schmid v. Frosch, No. 80-0097 (D.D.C. 1984)	$75-$125	ADEA

NOTE: An asterisk next to the title indicates that a copy of the opinion is not among those that are available in the Attorneys' Fees' Award Opinion File located in Margaret Frost's office.

Table D

ATTORNEY FEE AWARDS AGAINST STATE AND MUNICIPAL GOVERNMENTS
1977 - 1983

I. $25 - $45 Per Hour

Case	Hourly Rate	Statute	Counsel
A. State Defendants			
1. Robert M. v. Benton, [illegible] F.2d [illegible] (8th Cir. 1980)	$30	§1988	Legal Services Corp. of Iowa
2. [illegible] v. Aggrey, 481 F. Supp. [illegible] (N.D. Ohio 1979)	$30	§ 1988	Advocates for Basic Legal Equity
3. Arkansas Community Organizations v. Arkansas State Board, 468 F. Supp. [illegible] (E.D. Ark. 1979)	$35	§ 1988	private counsel
4. Gunther v. Iowa State Men's Reformatory, 466 F. Supp. 367 (N.D. Iowa 1979)	$35	Title VII and § 1988	Iowa Civil Liberties Union
5. Wisconsin Socialist Workers v. McCann, 460 F. Supp. 1054 (E.D. Wis. 1978)	$45	§ 1988	Wisconsin Civil Liberties Union Foundation
6. Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980)	$33	§ 1988	ACLU Foundation of Colorado, Inc.
7. Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979), cert. denied, 445 U.S. 919 (1980)	$25-30 (2nd attorney)	§ 1988	private counsel
8. Loney v. Scurr, 494 F. Supp. 928 (S.D. Iowa 1980)	$20-50	§ 1988	Prisoner Assistance Clinic and law students
9. Gagne v. Maher, 455 F. Supp. 1344 (D. Conn. 1978)	$45	§ 1988	Legal Aid Society of Hartford County
10. Thon v. Aggrey, 455 F. Supp. 1 (N.D. Ohio 1977)	$30	§ 1988	Advocates for Basic Legal Equity

	Case	Hourly Rate	Statute	Counsel
B.	Municipal Defendants			
1.	*Hardy* v. *Porter*, 613 F.2d 112 (5th Cir. 1980)	$40	Title VII	private counsel
2.	*Crain* v. *City of Mountain Home*, 611 F.2d 726 (8th Cir. 1979)	$40	§ 1988	private firm
3.	*Barrett* v. *Kalinowski*, 458 F. Supp. 689 (M.D. Pa. 1978)	$30-40	§ 1988	Northern Pennsylvania Legal Services, Inc.
4.	*David* v. *City of Scranton*, 633 F.2d 676 (3d Cir. 1980)	$40	not reported	Northern Pennsylvania Legal Services, Inc.
5.	*Watkins* v. *Mobile Housing Board*, 632 F.2d 565 (5th Cir. 1980)	$45	§ 1988	Legal Services Corp. of Alabama
6.	*Cantrell* v. *Vickers*, 524 F. Supp. 312 (N.D. Miss. 1981)	$40-50 (associates)	§ 1988	private counsel
	Willett v. *Chester Water Authority*, 447 F. Supp. 967 (E.D. Pa. 1978)	$30-50	§ 1988	Delaware County Legal Assistance Association

II. $50 - $70 Per Hour

Case	Hourly Rate	Statute	Counsel
A. State Defendants			
1. *Alexander* v. *Hill*, 553 F. Supp. 1263 (W.D.N.C. 1983)	$63.30 (senior para-legal with bonus)	§ 1988	North Carolina Legal Services
2. *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980)	$50	§ 1988	private counsel
3. *McCann* v. *Coughlin*, 698 F.2d 112 (2d Cir. 1983)	$60	§ 1988	Cravath, Swaine & Moore
4. *Brewster* v. *Dukakis*, 544 F. Supp. 1069 (D. Mass. 1982)	$66-88 (with 10% bonus)	§ 1988	Western Mass. Legal Services
5, *Ruiz* v. *Estelle*, No. H-78-987-CA (S.D. Tex. Nov. 17, 1980)	$70	§ 1988	private firm
6. *Dietrich*, v. *Miller*, 484 F. Supp. 42 (N.D. Ill. 1980)	$40-65	§ 1988	Legal Assistance Foundation of Chicago
7. *Custom* v. *Quern*, 482 F. Supp. 1000 (N.D. Ill. 1980)	$45-50	§ 1988	Legal Assistance Foundation of Chicago
8. *Battle* v. *Anderson*, 614 F.2d 251 (10th Cir. 1980)	$60	§ 1988	ACLU of Oklahoma
9. *Ladies Center* v. *Thone*, 645 F.2d 645 (8th Cir. 1981)	$55-75	§ 1988	private counsel
10. *McCormick* v. *Edwards*, 479 F. Supp. 295 (M.D. La. 1979)	$50	§ 1988	private counsel
11. *Burchett* v. *Bower*, 470 F. Supp. 1170 (D. Ariz. 1979)	$40-60	§ 1988	private firm

Case	Hourly Rate	Statute	Counsel
12. Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979)	$50	§ 1988	Legal Aid Society of Louisville, Inc.
13. Smith v. University of North Carolina, 19 EPD 9040 (M.D.N.C. 1979)	$50	Title VII	private counsel
14. Lund v. Affleck, 442 F. Supp. 1109 (D.R.I. 1977), aff'd, 587 F.2d 75 (1st Cir. 1978)	$55	§ 1988	Rhode Island Legal Services
15. Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978) */	$50	§ 1988	court appointed private counsel
16. Suzuki v. Yuen, 507 F. Supp. 819 (D. Hawaii 1981)	$40-75	§ 1988	private firm
17. Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977)	$60	§ 1988	private counsel
B. Municipal Defendants			
1. Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982)	$50	§ 1988	pro se; court appointed private firm for appeal
2. Thomas v. Board of Education, 505 F. Supp. 102 (N.D.N.Y. 1981)	$40-50	§ 1988	New York Civil Liberties Union
3. Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981)	$40-60	§ 1988	private firm
4. McPherson v. School District, 465 F. Supp. 749 (S.D. Ill. 1979)	$50-70	§ 1988	private counsel
5. Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978) */	$50	§ 1988	court appointed private counsel
6. Holy Spirit v. Caughy, 455 F. Supp. 1154 (M.D. Pa. 1978)	$55	§ 1988	private counsel

---

*/ Note that this case involved both state and municipal government defendants, and is listed accordingly in both sections.

	Case	Hourly Rate	Statute	Counsel
	Cantrell v. Vickers, 524 F. Supp. 312 (N.D. Miss. 1981)	$50-75 (lead counsel)	§ 1988	private counsel
8.	Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), aff'd, 563 F.2d 741 (5th Cir. 1977)	$40-60	§ 1988	court appointed private counsel
9.	Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294 (D. Mass. 1979)	$50-65	§ 1988	private counsel

III. $75 - $95 Per Hour

	Case	Hourly Rate	Statute	Counsel
A.	State Defendants			
1.	*Mader* v. *Crowell*, 506 F. Supp. 484 (M.D. Tenn. 1981)	$75	§ 1983 and Title VII	private firm
2.	*Imprisoned Citizens* v. *Shapp*, 473 F. Supp. 1017 (E.D. Pa. 1979)	$57.50-103.50 (with 15% bonus)	§ 1983	private firm
3.	*Pugh* v. *Rainwater*, 465 F. Supp. 41 (S.D. Fla. 1979)	$90	§ 1983	Legal Services of Greater Miami/ law professor
4.	*Strama* v. *Peterson*, 689 F.2d 661 (7th Cir. 1982)	$80 (lead counsel)	§ 1983	private firm
5.	*Ross* v. *Saltmarsh*, 521 F. Supp. 753 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982)	$50-93.75 (includes 25% bonus)	§ 1983	Children's Defense Fund and Mid-Hudson Valley Legal Services
6.	*Corpus* v. *Estelle*, 605 F.2d 175 (5th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980)	$75-90 (lead counsel)	§ 1983	private firm
7.	*Stenson* v. *Blum*, 512 F. Supp. 680 (S.D. N.Y.), *aff'd mem.*, 671 F.2d 493 (2d Cir. 1981), *cert. granted*, 103 S. Ct. 1426 (1983)	$95	§ 1983	Legal Aid Society
8.	*Swift* v. *Blum*, 502 F. Supp. 1140 (S.D.N.Y. 1980)	$75-100	§ 1983	West Chester Legal Services, Inc.
9.	*Becker* v. *Blum*, 487 F. Supp. 873 (S.D.N.Y. 1980)	$75-90	§ 1983	Mid-Hudson Legal Services, Inc. and Greater Upstate Law Project
10.	*Palmigiano* v. *Garrahy*, 466 F. Supp. 732 (D.R.I. 1979), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980)	$70-80	§ 1983	ACLU National Prison Project

Case	Hourly Rate	Statute	Counsel
11. Morrow v. Finch, 642 F.2d 823 (5th Cir. 1981)	$75	§ 1988	Lawyers' Committee for Civil Rights Under Law
12. Alexander v. Hill, 553 F. Supp. 1263 (W.D.N.C. 1983)	$81.96 (includes bonus)	§1988	North Carolina Legal Services

B. Municipal Defendants

Case	Hourly Rate	Statute	Counsel
1. Pittman v. Board of Education, No. Civ. 78-735-JB (D.N.M. 1980)	$50-60	§ 1988	private firm
2. Bryant v. City of Marianna, 532 F. Supp. 133 (N.D. Fla. 1982)	$75	Fed. R. Civ. P. 37	private firm
3. Langdon v. Drew Municipal Separate School District, 512 F. Supp. 1131 (N.D. Miss. 1981)	$75 (lead counsel) $60 (co-counsel)	§ 1988	private firm
4. Schwabenbauer v. Board of Education, 515 F. Supp. 33 (W.D.N.Y. 1981), vacated, 677 F.2d 305 (2d Cir. 1981)	$75	Title VII	New York State United Teachers
5. Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979)	$62.50 (lead counsel office time)	§ 1988	NAACP Legal Defense Fund and private counsel
6. Holy Spirit Association v. Peterson, 479 F. Supp. 428 (N.D. Ill. 1979)	$75	§ 1988	private firm

IV. $100 And Above Per Hour

	Case	Hourly Rate	Statute	Counsel
A.	State Defendants			
1.	*Morrow* v. *Finch*, 642 F.2d 823 (5th Cir. 1981)	$100 (lead counsel)	§ 1988	Lawyers Committee for Civil Rights Under Law
2.	*Ruiz* v. *Estelle*, No. H-78-987-CA (S.D. Tex. Nov. 17, 1982)	$75-150	§ 1988	private firm
3.	*Rajender* v. *University of Minnesota*, 546 F. Supp. 158 (D. Minn. 1982)	$125-375 (with 200% bonus)	Title VII	private firm
4.	*Palila* v. *Hawaii Department of Land and Natural Resources*, 512 F. Supp. 1006 (D. Hawaii 1981)	$75-110	Endangered Species Act	Sierra Club & private firm
5.	*Bolden* v. *Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980)	$90-180 (with (50% bonus)	§ 1988	Community Legal Services
6.	*Stenson* v. *Blum*, 512 F. Supp. 680 (S.D.N.Y.), *aff'd mem.*, 671 F.2d 493 (2d Cir. 1981), *cert. granted*, 103 S. Ct. 1426 (1983)	$142.50-157 (with 50% bonus)	§ 1988	N.Y. Legal Aid Society
7.	*Alexander* v. *Hill*, 553 F. Supp. 1263 (W.D.N.C. 1983)	$102.45 (includes bonus)	§ 1988	North Carolina Legal Services
8.	*Ross* v. *Saltmarsh*, 521 F. Supp. 753 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982)	$100-112.50 (includes 25% bonus)	§ 1988	Children's Defense Fund and Mid-Hudson Valley Legal Services
B.	Municipal Defendnts			
1.	*Selzer* v. *Berkowitz*, 477 F. Supp. 686 (E.D. N.Y. 1979)	$125 (partners)	§ 1988	Donavan, Leisure
2.	*Neely* v. *City of Grenada*, 77 F.R.D. 484 (N.D. Miss. 1978), *vacated*, 624 F.2d 547 (5th Cir. 1980)	$100 (lead counsel)	§ 1988	private counsel

	Case	Hourly Rate	Statute	Counsel
3.	*Farris* v. *Cox*, 508 F. Supp. 222 (N.D. Cal. 1981)	$70-100	§ 1988	Redwood Legal Assistance and S.F. Neighborhood Leg. Assistance Foundation
4.	*Northcross* v. *Board of Education of Memphis*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*., 447 U.S. 911 (1980)	$137.50 (lead counsel trial time)	§ 1988	NAACP Legal Defense Fund and private counsel
5.	*Gautreaux* v. *Landrieu*, 523 F. Supp. 684 (N.D. Ill. 1981), *aff'd*, 690 F.2d 601 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2438 (1983) */	$125	§ 1988	Illinois ACLU

---

*/ This case involved the federal government as a defendant, however, all fees were awarded against and paid by the Chicago Housing Authority.

LEGAL FEES EQUITY ACT

FACT SHEET

The Department of Justice is proposing legislation to raise the compensation rates under the Criminal Justice Act and to establish a number of important guidelines for awards of attorneys' fees in civil judicial and administrative proceedings against federal, state, and local government defendants. These uniform new rules have been adapted from existing judicial and legislative precedent. The intent is to achieve a more equitable balance in compensation among the various attorneys litigating for or against the government -- attorneys for the government, defense attorneys paid under the Criminal Justice Act, and private attorneys receiving fees under civil fee-shifting statutes. The Department's support for increased Criminal Justice Act rates is contingent upon the enactment of new standards for the award of attorneys' fees under civil fee-shifting statutes.

BACKGROUND

Numerous federal statutes permit prevailing parties to recover the cost of attorneys' fees in many kinds of civil litigation and administrative proceedings against the United States, states, or local governments. Although Federal law limits the compensation of government attorneys and the amounts paid to private attorneys representing indigent criminal defendants, the Federal statutes permitting the recovery of attorneys' fees provide little or no guidance for determining the amount of the fees awarded to prevailing parties. Only the recent Equal Access to Justice Act limits fee awards to $75 per hour.

As a consequence, courts have reached conflicting interpretations of these civil statutes, and in some cases have made awards of attorneys' fees that greatly exceed the relief obtained by the parties in the proceeding. Multipliers and bonuses have been used to double, and even triple, normal commercial hourly rates. Awards of attorneys' fees rates in excess of $100 per hour are increasingly common, with some awards exceeding $400 per hour through the use of multipliers. These developments have fueled litigation over attorneys' fee awards that frequently overshadows the case on the merits.

Federal, state, and local taxpayers are the ones who must bear the cost of these excessive attorneys' fee awards. It is particularly inappropriate for Federal statutes to impose these burdens on the state and local governments in circumstances and amounts not limited by Congress.

While civil attorneys have increasingly used federal fee-shifting statutes as a means of obtaining excessive awards against federal, state, and local government defendants, defense attorneys for indigent criminal defendants have been limited to maximum compensation of $30 per hour for time in court and $20 per hour for time out of court under provisions of the Criminal Justice Act that have not been changed since 1970.

THE PROPOSED LEGISLATION

With respect to Criminal Justice Act fees for attorneys representing indigents, the bill would

- double the hourly rate of compensation, from $30 per hour for time in court and $20 per hour for out-of-court time to $60 and $40 per hour, respectively.

- double the maximum allowable compensation for various judicial proceedings. The new limits would be $2,000 per attorney for felony cases, $800 for misdemeanor cases, and $500 for post-trial and probation revocation proceedings.

With respect to Federal statutes authorizing the recovery of attorneys' fees from the United States or state or local governments in civil suits or administrative proceedings, the bill would

- set a $75 per hour maximum rate for attorneys' fees awarded, and eliminate the use of bonuses and multipliers to escalate fee awards. This will compensate "private attorneys general" at a level commensurate with (but still significantly higher than) that of their government counterparts, but provide a reasonable incentive sufficient to attract competent counsel.

- allow recovery of attorneys' fees only when a party has prevailed on the merits of its complaint, or where the suit is concluded by a favorable settlement agreement.

- allow recovery of attorneys' fees only for work performed on issues on which the party prevailed.

- permit the reduction or denial of the amount of fee awards, for example, where a party has unreasonably protracted the litigation; where the services provided were excessive with regard to the nature of the controversy; or where the fee award would unreasonably exceed the hourly salary of a salaried attorney.

- provide that monetary judgments be reduced (but not more than 25%) by the amount of the attorneys' fees allowed in the proceeding. Exceptions are allowed for suits under certain provisions of the Equal Access to Justice Act, suits for recovery of disputed taxes, or in cases of undue hardship.

- establish certain procedural requirements for attorneys' fee applications, including a 30 day time limit after final judgment for submitting fee applications, and require courts and agencies to develop additional guidelines.

- clarify the circumstances in which attorneys' fees may be awarded when a claim becomes moot or the party refuses to accept a reasonable settlement offer.

Section by Section Analysis

Section 2 -- Findings and Purposes

Numerous federal statutes provide that parties to civil suits and administrative proceedings against the United States, states, or local governments may, in appropriate circumstances, recover "reasonable attorneys' fees" from government defendants. These statutes have put a great burden on the courts because, for the most part, Congress has provided little or no guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a consequence, courts have reached conflicting interpretations of these statutes -- in some cases using "multipliers" and "bonuses" to double, and even triple, the normal hourly rates of the prevailing party's attorney. This has resulted in uncertainty at least the appearance of arbitrariness or unfairness to litigants. Litigation over attorneys' fee awards frequently overshadows the case on the merits, and has led to the creation of a burgeoning area of practice for attorneys' fee litigators.

The problems evident in this area are in some respects even more serious with respect to the states and localities. Recent decisions of the Supreme Court have expanded greatly the liability of states and local governments to suits under various Federal statutes, and correspondingly to awards of attorneys' fees. As the liability of the states and localities has greatly expanded in recent years, the obligation of Congress to define more clearly the circumstances and extent to which they should be held liable for attorneys' fees under Federal statutes has also grown.

The purpose of the bill is to have Congress provide greater guidance to the courts and federal agencies for the award of attorneys' fees pursuant to federal statute, and to reduce the current uncertainties and disparities reflected in the present decisions. The bill is not intended to deny fees to attorneys for prevailing parties; only to set common standards and procedures that would apply to all awards of attorneys' fees against the United States, and against state and local governments. This will increase the fairness and equity of the current maze of fee-shifting statutes, and should increase public acceptance of these statutes which compensate private attorneys from the public treasury.

Another important purpose of the bill is to provide for greater balance between the high hourly rates of compensation for private attorneys who sue the government in civil litigation and the much lower hourly rates of compensation for attorneys who represent indigent criminal defendants in proceedings under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A(d)(1) & (2). In contrast to hourly rates of over $200 (including multipliers) in some civil attorneys' fee awards, criminal defense attorneys have received the same rates of $20 and $30 per hour since 1970. The bill would double the current hourly rates under the CJA.

With respect to civil judicial and administrative proceedings, the bill is intended to provide guidance in the calculation of fee awards, and to limit the hourly rate of compensation to $75 per hour, which is the same rate established in the recently-enacted Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1) and (d)(3) and 5 U.S.C. § 504(b). The bill would eliminate the use of bonuses and multipliers.

The bill is also intended to limit the recovery of attorneys' fees to those cases in which a party has prevailed on the merits of the complaint, and only for work performed on issues in the case on which the party prevailed. The bill also specifies several discretionary bases for reducing or denying fee awards that otherwise would be allowed under federal fee-shifting statutes -- for example, where a party's conduct unreasonably protracted the litigation; or the requested fee award unreasonably exceeds the hourly salary of a salaried attorney -- and provides, in any case where a party recovers a money judgment against a federal, state, or local government, for 25% of the judgment to be applied to the party's legal fees. 1/

Section 3 -- Definitions

Section 3 defines the terms used in the bill. "Attorneys' fees" are defined as fees attributable to professional legal services performed by a person, or persons, licensed to practice law, including enrolled tax practitioners who practice before the United States Tax Court. This definition is intended

---

1/ This 25% reduction would not apply to suits under certain provisions of the Equal Access to Justice Act, to suits for recovery of disputed taxes under 26 U.S.C. § 7430, or where undue hardship would result.

to limit awards to licensed practitioners, and not to allow awards to non-licensed, pro se claimants or law students. 2/ The definition applies to all fee-shifting statutes, and is intended to cover all awards of fees that in fact reflect compensation of attorneys, however denominated, including those designated as "costs" by the court or administrative agency. 3/ "Attorneys' fees" includes "overhead expenses" but does not include "related expenses."

Expenses to be included as "overhead expenses" should be considered as such except in extraordinary circumstances. The list of overhead expenses is not exhaustive, and other

---

2/ Most courts have ruled that pro se litigants generally are ineligible for attorneys' fees awards. See Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981); Owens - El v. Robinson, 498 F. Supp. 877 (W.D. Pa. 1980); Crooker v. Department of Justice, 632 F.2d 916, 922 (1st Cir. 1980); and Burke v. Department of Justice, 559 F.2d 1182 (10th Cir. 1977), aff'g mem. 432 F. Supp. 251 (D. Kan. 1976). The D.C. Circuit, however, has awarded attorneys' fees under the FOIA to pro se prisoners and to law students who received 12 hours of course credit. See Crooker v. Department of Treasury, 663 F.2d 140 (D.C. Cir. 1980); Jordan v. Department of Justice, No. 81-1380 (D.C. Cir. Oct. 5, 1982). The definition of "attorney," however, is not intended to affect judicial interpretations regarding whether individual statutes authorize awards of attorneys' fees to licensed attorneys appearing pro se. For example in White v. Arlen Realty & Development Corp., 614 F.2d 387 (4th Cir.) (per curiam), cert. denied, 447 U.S. 923 (1980), the Fourth Circuit denied an award of attorneys' fees to a plaintiff-attorney under the Truth-in-Lending Act.

3/ Generally, courts have followed the principle that attorneys' fees are not costs, but are separate, with attorneys' fees awards authorized by various fee-shifting statutes and costs authorized by 28 U.S.C. §§ 2412(a) and 1920. However, some statutes, such as Title VII of the Civil Rights Act and 42 U.S.C. § 1988, have been interpreted to make attorneys' fees part of costs. See Delta Air Lines v. August, 450 U.S. 346 (1981) (Title VII). If left unaddressed, parties could attempt to circumvent the $75 fee limitation and other provisions in this bill regarding attorneys' fees by seeking attorneys' fees as costs under these statutes.

appropriate expenses may be included as "overhead expenses." The list is intended to preclude considering these expenses as "related expenses," except in extraordinary circumstances.

"Related expenses" are those expenses that may be awarded pursuant to federal statute, are not "overhead expenses," and are actually incurred by the attorney as a result of judicial or administrative proceedings. The term is intended to be a generic term encompassing those expenses that can properly be awarded under federal law; it does not expand the types of expenses that may be awarded. "Related expenses" does not include "attorneys' fees."

This definition is not intended to affect case law under Title VII and 42 U.S.C. § 1988 which, in some instances, has authorized awards of costs beyond those specified in 28 U.S.C. § 1920 to include such items as lodging and travel expenses. See, e.g., Northcross v. Board of Education, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). However, as noted, the definition of overhead expenses precludes considering the items enumerated there as "related expenses." The definition also excludes costs enumerated in 28 U.S.C. § 1920, and the bill is not intended to affect the allocation of costs enumerated in that section.

Courts and administrative officers may include as "related expenses" actual costs incurred for the services of paralegals and law clerks who assist attorneys in representing their clients.

The definitions of "decision on the merits" and "prevail on the merits" are discussed in connection with the provisions of section 5(l) of the bill, which requires that a party seeking an award of attorneys' fees must prevail on the merits.

Section 4 -- Scope and Application; Relationship to Other Laws

Subsection (a) provides that the provisions of this bill are intended to apply to all awards of attorneys' fees against the United States, or any state or local government, and to establish minimum criteria for such awards. In this way, this bill will provide greater uniformity and order for the scores of attorneys' fee statutes that authorize awards of attorneys' fees and related expenses against the federal, state, and local governments.

Subsection (b) provides the general rule that, notwithstanding any other provision of law, the provisions of this bill would apply to, and modify, all federal fee-shifting statutes, including the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412(b) and (d). No award of attorneys' fees and related expenses could exceed the amounts determined under the bill.

Subsection (c) provides that the criteria for the awards of attorneys' fees and related expenses established by this bill would not supersede more restrictive criteria contained in other statutes for making such awards. The provisions of this bill establish minimum criteria to be applied for determining and awarding attorneys' fees and related expenses or costs in judicial and administrative proceedings against the United States or against state or local governments. 4/

Subsection (d) provides that nothing in the bill shall be interpreted to create any right to an award of attorneys' fees or related expenses. Any right to such an award derives solely from the provisions of other laws.

The bill does not affect the award of attorneys' fees against the government in cases such as those under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, or cases involving National Service Life Insurance or United States Government Life Insurance, under 38 U.S.C. § 784. Those statutes are not federal fee-shifting statutes, because the attorneys' fees are paid from the prevailing party's total award of damages or proceeds and are not a separate award entered against the government.

Subsection (e) provides that, although the bill generally would apply to awards under the Equal Access to Justice Act ("EAJA"), the provisions of section 6(a)(1) (establishing a limitation of $75 per hour for attorneys' fees) and section 6(c) (reduction of fee awards in money damages cases) of the bill would not apply to awards made under 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) & (d)(3). Those sections of the EAJA provide that awards of attorneys' fees may be made unless the government proves that its position in the litigation was

---

4/ For example, 5 U.S.C. § 7701(g)(1) provides that attorneys' fees may be awarded if (1) the party has prevailed; and (2) the award of attorneys' fees would be "warranted in the interest of Justice. . . ." The second of these two criteria, which is not contained in the bill, would continue to apply.

substantially justified. In addition, the factors listed for reduction of fee awards in paragraphs (4) and (5) of section 6(b) of the bill would not apply under those provisions of the EAJA. 5/ The language and legislative history of those provisions of the EAJA reflect Congress's intent to award attorneys' fees to prevailing parties who meet the qualifications of that Act, unless the government's position was "substantially justified" or "special circumstances" would make an award of attorneys' fees unjust. The purpose of this subsection is to assure that the special characteristics of the EAJA in this respect will not be affected by this bill. The exceptions described in this subsection would not apply to attorneys' fee awards under 28 U.S.C. § 2412(b).

Subsection (f) provides that the provisions of the bill shall not apply in federal criminal proceedings or civil habeas corpus proceedings in the federal courts, except for the provision in section 6(d) of the bill which would double the allowable amounts of attorneys' fees under the Criminal Justice Act, 18 U.S.C. § 3006A.

Section 5 -- Allowance of Attorneys' Fees

Section 5 of the bill establishes the prerequisites to an award of attorneys' fees and related expenses against the United States, or against state or local governments, in any

---

5/ These discretionary factors authorize a reduction of the attorneys' fee award based on findings that the time and legal services were excessive with regard to the nature of the controversy, or that the amount sought unreasonable exceeds the monetary result or injunctive relief achieved.

civil judicial or administrative proceeding to which a federal fee-shifting statute applies. The party seeking such awards must establish, and the court or administrative officer must determine, (1) that the party prevailed on the merits of its complaint in the proceeding; (2) that the work for which the award is sought was performed in connection with issues on which the party prevailed and was necessary to resolve the controversy; (3) that the application is submitted in compliance with the procedural requirements of Section 7; (4) that the attorneys' fees sought do not exceed amounts authorized under Section 6; and (5) that the services for which attorneys' fees are sought are not excessive, redundant, or otherwise unnecessary.

As set forth in section 4(c) of the bill, the requirements of this section for awards of attorneys' fees, including the requirement that a party "prevail," are not intended to supersede other additional requirements established by law, such as those under 5 U.S.C. § 7701(g)(1) (where an award to a prevailing party must be "warranted in the interest of Justice.").

Nothing in this section is intended to change the burden of proof for determinations of "substantial justification" in applications for fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) & (d)(3). The burden remains on the government to prove "substantial justification" in connection with such applications.

Prevail on the Merits. Paragraph (1) would preclude awards of attorneys' fees and related expenses against the United States and against state and local governments unless the party seeking the award prevailed on the merits of its complaint. The definition of "prevail on the merits" focuses on whether the party was successful on significant issues in the controversy and obtained significant relief in connection with these issues. This is intended to be a more flexible standard than some formulations of this term. Cf. Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981) (a prevailing party for attorneys' fees purposes "has been successful on the central issue" in the case, and has "acquired the primary relief sought"). The relief sought need not be "central," but must be significant in terms of the result sought by the party. In this respect, the bill reflects the first part of the test enunciated by the Supreme Court in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983) ("plaintiffs may be considered prevailing parties for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit") (emphasis added).

This bill differs, however, from the second part of the Hensley formulation. The language of Hensley is subject to misreading, as occurred in Laffey v. Northwest Airlines, Inc., No. 2111-70 (D.D.C. July 29, 1983). There, the district court found that the plaintiffs to be prevailing parties for all purposes even though they in fact failed to achieve the results sought in important respects.

The purpose of the bill is to state more precisely that the relief obtained by the party must be significant, not merely "some of the benefit" the party sought. The relief obtained should be significant in terms of the result sought by the party in bringing the suit. Cf. Hensley v. Eckerhart, 103 S. Ct. at

1943 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole").

The requirement to show that the party has prevailed on the merits would also apply to statutes, such as the Clean Air Act, that authorize the award of attorneys' fees "when appropriate." 6/

This paragraph provides that the party must prevail in a "decision on the merits" of a court or a final disposition by an agency in an administrative proceeding. The Federal Rules of Civil Procedure generally define a final judgment as any order from which an appeal lies, including dismissals and default and summary judgments, and final judgments entered on less than all pending claims pursuant to Rule 54(b). The definition of "decision on the merits" is limited to those final judgments in which the party establishes entitlement to relief on the merits. Thus, an award of attorneys' fees would not be appropriate for a party who has prevailed only on a motion for preliminary injunction or for a temporary restraining order, where the merits of the suit have not been resolved. However, the definition would permit the award of attorneys' fees where the party

---

6/ The Supreme Court in Ruckelshaus v. Sierra Club, 51 U.S.L.W. 5132, 5136 (U.S. July 1, 1983) (No. 82-242), held that the claimant must demonstrate that it enjoyed "some degree of success on the merits" in order to receive attorneys' fees under the Clean Air Act, which provides for such fees "when appropriate."

defending against a suit brought by the government obtains the dismissal of a groundless complaint. 7/

The bill would not preclude so-called "interim awards" of attorneys' fees where the text or legislative history of an applicable fee-shifting statute indicates that Congress has authorized them, but such awards should be made only "to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam). In Hanrahan, the Supreme Court noted that the legislative history of 42 U.S.C. § 1988 cited, as examples of appropriate circumstances for interim fee awards, two cases 8/ in which the "party to whom the fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered." Id. at 757. The Court found that the plaintiffs had not prevailed on the merits of any of their claims and reversed the award of attorneys' fees. Id. at 758. Further, the Court ruled that attorneys' fees are not to be awarded for nondispositive rulings regarding matters of discovery, evidence, or procedure. Id. at

---

7/ See H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. 21-22 (1980). See also United States ex rel. Heydt v. Citizens State Bank, 668 F.2d 444, 447 (8th Cir. 1982) (organization which successfully opposed IRS summons in order to protect the confidentiality of its members was a prevailing party under the EAJA; however, no attorneys' fees were awarded because the IRS position was substantially justified).

8/ Bradley v. Richmond School Board., 416 U.S. 696 (1974) and Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), are cited in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 6 (1976).

759. See also Smith v. University of North Carolina, 632 F.2d 316, 350-51 (4th Cir. 1980).

Paragraph (1) is not intended to modify existing case law providing that attorneys' fees may be awarded in cases where the litigation is terminated by settlement agreement, as long as the party seeking fees has prevailed on the merits of the relief sought. 9/ Nor is the provision intended to preclude discussions between the parties of attorneys' fees, or the waiver thereof, before the decision on the merits by a court or the final disposition by an administrative officer, or to prevent the government from discussing liability for attorneys' fees in conjunction with liability on the merits as part of a settlement agreement, or from including in a settlement agreement provisions for attorneys' fees and related expenses or costs.

Necessary Work on Prevailing Issues. Under paragraph (2), a prevailing party seeking an award of attorneys' fees and related expenses against the United States, or against state or local governments, must show that the work for which fees are sought was performed in connection with issues, substantive or

---

9/ See, e.g., Ward v. Schweiker, 562 F. Supp. 1173 (W.D. Mo. 1983). As the court stressed in Parker v. Matthews, 411 F. Supp. 1059, 1054 (D.D.C. 1976), aff'd, 561 F.2d 320 (D.C. Cir. 1977), the settlement should be carefully scrutinized to determine if an award of attorneys' fees is justified:

> "[W]hether to award attorneys' fees where there has been a settlement of a Title VII lawsuit must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the central issue -- discrimination."

procedural, upon which the party prevailed, and was necessary to the resolution of the controversy. 10/ This provision is not intended to preclude awards of attorneys' fees and related expenses where a party's pleadings contain meritorious alternative grounds for relief, based on the same facts as those on which the party prevailed, on which a court or administrative officer did not rule because the party prevailed on other grounds. In such instances, awards of attorneys' fees and related expenses may include amounts attributable to time expended on such alternative pleadings, if the court or administrative officer determines that the alternative pleadings were reasonably directed to the resolution of the merits of the controversy. Awards of attorneys' fees and related expenses are not to be made in cases where the specific statutory provisions construed in the case do not provide for the award of attorneys' fees. 11/

10/ See Hensley v. Eckerhart, supra, 103 S. Ct. at 1940 ("[W]ork on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' . . . [T]herefore no fee may be awarded for services on the unsuccessful claim.").

11/ See Smith v. Cumberland School District, 703 F.2d 4 (1st Cir. 1983) (reversing district court's award of attorneys' fees where case was grounded on the Education for All Handicapped Children Act, which does not provide for the award of attorneys' fees, even though the plaintiff included allegations based on section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, which the courts did not reach), cert. granted sub nom. Smith v. Robinson, 52 U.S.L.W. 3342 (U.S. Oct. 31, 1983) (No. 82-2120). Thus, awards of attorneys' fees would not be appropriate "where the fee-triggering statute plays no role but that of allowing attorney fees." Tatro v. Texas, 516 F. Supp. 968, 984 (N.D. Tex. 1981), aff'd, 703 F.2d 823 (5th Cir. 1983).

Other showings. Paragraphs (3) and (4) require that the application for awards of attorneys' fees and related expenses be made in accordance with the provisions of this Act. Paragraph (5) requires the party seeking attorneys' fees to establish that the services for which fees are sought were not "excessive, redundant, or otherwise unnecessary." 12/ Because intervenors are "parties" for the purposes of this bill, they may receive awards of attorneys' fees if they meet the requirements of the applicable fee-shifting statute and this bill, including the showing required by this paragraph.

Section 6 -- Amount of Attorneys' Fees

Civil Fee-Shifting Statutes

Paragraph 6(a)(1) establishes a maximum hourly rate of $75 for attorneys' fees awards against the United States, states, and local governments under federal fee-shifting statutes. 13/ This provision shall not apply to awards under the Equal Access

---

12/ See Hensley v. Eckerhart, supra, 103 S. Ct. at 1940.

13/ In determining the total award of attorneys' fees, courts and administrative officers should continue the practice of determining the number of hours reasonably expended in the proceeding, multiplied by a reasonable hourly rate not exceeding $75. In deciding whether the hours claimed were "reasonably expended" under any fee shifting statute, the Supreme Court has admonished that "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." Hensley v. Eckerhart, supra, 103 S. Ct. at 1940, citing Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). In arriving at the total fee award, the factors set forth in section 6(b) and those identified by the Supreme Court in Hensley v. Eckerhart, supra, 103 S. Ct. at 1940-41, should be considered.

to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) and (d)(3), because the EAJA has its own limit of $75 per hour, subject to specified exceptions. 14/ In calculating the amount of any award of fees, section 6(a)(2) provides that multipliers or bonuses shall not be used.

The $75 per hour limit in subsection (a) is intended to assure that fees paid to private counsel in fee-shifting cases are brought more in line with the salaries of attorneys who represent the government in these cases, while providing sufficient incentive to attract competent counsel. This is appropriate, because many federal fee-shifting statutes are premised on the theory that groups or individuals who sue the government for the public benefit are acting as "private attorneys general." Attorneys' fees paid by taxpayers to these "private attorneys general" should be generally commensurate with the salaries paid by taxpayers to federal "public attorneys general." 15/ Even the rate of $75 per hour set in the bill is well above the compensation of government attorneys.

14/ The provisions of the Equal Access to Justice Act, unlike other fee-shifting statutes, predicate awards of attorneys' fees not only upon a finding that the party prevailed, but also that the government was not substantially justified in its position. In light of the latter requirement and the EAJA's existing fee limitation provision, it is unnecessary to apply the general fee limitation of this bill to the EAJA.

15/ Federal fee-shifting statutes "should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general." Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974).

It is emphasized that this subsection establishes only a maximum hourly rate of compensation, and that prevailing rates may in fact be less than the maximum allowed under the bill. Courts should give due consideration to the fees normally received by the attorney for similar work and other relevant factors. Attorneys' fees may be awarded at hourly rates less than the maximum established by this bill.

Subsection (b) provides that courts or administrative officers may reduce or deny awards of attorneys' fees and related expenses against the United States, or against state or local governments, where it is determined that (1) the prevailing party unreasonably protracted the final resolution of the controversy; (2) there is no bona fide attorney-client relationship with an identified client; (3) the attorneys' fee unreasonably exceeds the hourly salary of a salaried attorney; (4) the time and legal services provided were excessive with regard to the nature of the controversy; (5) that the attorneys' fee award otherwise allowable would unreasonably exceed the monetary result or injunctive relief achieved in the proceeding; or (6) the award would otherwise be unjust or inappropriate. The amount of any reductions pursuant to this subsection shall be at the discretion of the court or administrative officer. The fourth and fifth factors would not apply to awards under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) of the Equal Access to Justice Act. This exception is intended to maintain the status quo in the interpretation of the "special circumstances" provision of the EAJA, and not to affect the courts' construction of that term in the context of fee awards under the EAJA.

Paragraph (1) is patterned on the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(C) and 5 U.S.C. § 504(a)(3). Paragraphs (2) and (4) are similar to provisions for determining reasonable attorneys' fees in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1619(d)(2). Paragraph (4) is derived from Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978), where the district court was directed to determine whether it was reasonably necessary to spend the number of hours claimed by the attorneys in order to perform the legal services for which compensation was sought.

Paragraph (3) provides that the court or administrative officer may consider, as a basis for reducing an otherwise allowable fee award, whether the award would unreasonably exceed the hourly salary of the party's attorney. This provision is intended to apply to all attorneys who are paid on a salaried basis, including in-house counsel and associates in a law firm. As a general guideline, an application for an award may be regarded as unreasonably excessive under paragraph (3) if it is more than twice the attorney's hourly salary. Twice the attorney's hourly salary should, in general, provide reasonable compensation and cover normal overhead expenses. The bill does not require that awards be limited to 200% of an attorney's hourly salary in all cases, but is intended to encourage courts and administrative officers carefully to review applications for awards that would exceed that level, and to reduce awards that would confer windfalls on attorneys.

Paragraph (5) is intended to address the anomalous result where attorneys receive far greater benefit from the litigation than their clients, such as in cases where $100,000 is awarded in attorneys' fees for a $30,000 judgment, or where $22,000 in attorneys' fees is awarded for only a $500 award to each of three clients. In other cases, the injunctive relief actually achieved in the case might be so limited that it does not warrant the amount of attorneys' fees otherwise allowable. Cf. Hensley v. Eckerhart, supra, 103 S. Ct. at 1941 (The award of full attorneys' fees to a party who has achieved only partial or limited success would be "an excessive amount"). In determining whether reduction of an award is appropriate, courts or administrative officers should consider both the monetary judgment achieved and any significant injunctive or other equitable relief obtained by the parties in the proceeding.

Paragraph (6) provides that the bases for reducing an award of attorneys' fees that are listed in this subsection are not meant to be exclusive, and courts and administrative officers should continue to consider other factors that are appropriate under existing law. See Hensley v. Eckerhart, supra, 103 S. Ct. at 1940-41. For example, the legislative history of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, provides that "special circumstances" are to be considered by courts in awarding attorneys' fees. Nothing in this bill is intended to preclude consideration of such "special circumstances" to reduce the amount of fee awards against the government.

Finally, nothing in this bill is intended to overturn cases such as Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (1978), where plaintiffs were required to pay the defendant's attorneys' fees because the plaintiffs' claim was found to be "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith."

Subsection (c) provides that, whenever a monetary judgment is awarded against the United States, or against a state or local government, the judgment shall be reduced (but not more than 25%) by the amount of attorneys' fees allowed in the proceeding. The rationale for this offset is not to reduce the attorneys' compensation, but to provide that a prevailing party should pay part of its legal expenses from any monetary award recovered in a judicial or agency proceeding. This provision would not apply to attorneys' fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) & (d)(3), where fee awards are available only where the government's position was not substantially justified. Cf. note 14, supra. It also would not apply to awards in cases brought for recovery of disputed tax payments under 26 U.S.C. § 7430, in order to avoid inconsistent adjudications under the Internal Revenue Code. 16/ Finally, the provision would not apply where

---

16/ Inconsistent adjudications could result because the tax laws permit taxpayers who contest many government tax claims either: (1) to pay the contested taxes and sue for a refund in a district court or in the Claims Court, or (2) to bring suit, without payment, in the Tax Court. A taxpayer who sued in the District or Claims Court and won would receive a monetary award. Presumably, 25% of this amount would otherwise be applied to reduce any attorneys' fees award. However, a taxpayer who sued in the Tax Court and won would not receive a monetary award but, instead, simply a determination that no liability existed. Thus, the 25% reduction would hinge entirely upon the taxpayer's choice of forum, an anomalous result that would otherwise channel many more cases to the already overburdened Tax Court.

the reduction otherwise would result in undue hardship to the party in the circumstances of the case. This last exception is not intended to be routinely used, but in circumstances where a reduction of the judgment recovered by the party would clearly be unjust.

The 25% reduction in monetary awards to be applied toward attorneys' fees is similar to the provisions of the Federal Tort Claims Act, 28 U.S.C. § 2678, and section 206 of the Social Security Act, 42 U.S.C. § 406, which provide for compensation of attorneys from any monetary awards recovered by the parties.

Criminal Justice Act Fees

Subsection (d) would amend the Criminal Justice Act, 18 U.S.C. § 3006A(d), to double the compensation rates for defense attorneys in criminal proceedings. The Act's current maximum compensation rates -- which were last amended in 1970 -- of $30 per hour for time expended in court and $20 per hour for time expended out of court would be increased to $60 and $40, respectively. The Act would also double the maximum total compensation to $2,000 per attorney for felony cases, $800 per attorney for misdemeanor cases, and $500 per attorney for post-trial and probation revocation proceedings. The difference in the maximum hourly rate for Criminal Justice Act attorneys and attorneys in civil fee-shifting cases is appropriate because Criminal Justice Act attorneys, unlike those in fee-shifting cases, are compensated whether they win or not.

The bill also would delete the provision in 18 U.S.C. § 3006A(d)(1) that authorizes, as an alternative to the stated hourly rates, compensation at "such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." The intent of the bill is to create a maximum hourly rate for attorneys who represent parties under the Criminal Justice Act. 17/ However, the rates established in § 3006A are maximums, and the Judicial Council of the Circuit may, where appropriate, set a lower rate of compensation, consistent with guidance from the Judicial Conference of the United States.

Section 7 -- Timely Applications and Procedures

Subsection (a) establishes a jurisdictional requirement that a party seeking an award of attorneys' fees and related expenses submit an application for such award within 30 days of a final decision on the merits by a court or the entry of a final disposition by an administrative officer. A final decision on the merits is defined as the entry of judgment under the Federal Rules of Civil Procedure, and includes a dismissal of the suit and a dismissal pursuant to a settlement agreement. Parties may not be awarded attorneys' fees and related expenses by a court or administrative officer if the fee award application is made after the 30 day time limit.

17/ It should be noted that fee schedules set by bar associations have been held to violate the antitrust laws. Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773 (1975).

This requirement is consistent with the jurisdictional time for filing fee applications pursuant to the Equal Access to Justice Act, and is responsive to the Supreme Court's recent observation that courts can adopt procedural rules setting reasonable time limits for applications for attorneys' fee awards. White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982). 18/ Subsection (a) also requires the party seeking an award to submit such information as may be required by the court or administrative officer.

Subsection (b) directs courts and agencies to provide guidance to parties regarding the information required to be filed. Courts and agencies should, at the least, require submission of the following information: a statement of the basis of the claim for attorneys' fees; a statement that attorneys' fees are awardable under applicable law; a statement of the amount sought; a copy of any written fee agreement; and an itemized accounting of the hours expended and the specific tasks performed by the attorney in the proceedings. 19/ Further,

---

18/ As noted by the Supreme Court in White, courts currently differ with respect to the time in which attorneys' fees awards must be sought. Id., 455 U.S. at 450 n.9. Before White, some courts allowed only 10 days from the time of entry of judgment for filing of fee applications under Fed. R. Civ. P. 59(e); other circuits have imposed no time constraints. The Eighth Circuit has recommended a rule for filing attorneys' fee requests within 21 days after entry of judgment. See Obin v. District 9, Int'l Ass'n of Machinists, 651 F.2d 574, 583 (8th Cir. 1981).

19/ A requirement for this type of information is consistent with the District of Columbia Circuit's ruling in National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), which required detailed documentation by a party seeking an award of attorneys' fees.

courts and administrative officers should require the submission of information to assist them in making the findings under section 6(b) of this bill, with respect to the reduction of awards of attorneys' fees. Subsection (b) further requires courts and agencies to establish procedures regarding the timing of applications for attorneys' fees and supporting information, and the timing of judicial and agency rulings on these applications. 20/

To ensure that courts are consistent in issuing requirements for submission of information for fee applications, the bill anticipates that the Judicial Conference of the United States would prescribe guidelines for courts to follow in establishing these requirements. These guidelines would not supersede any requirements for submission of information required by law in conjunction with attorneys' fees applications. The bill also anticipates that agencies, when establishing requirements for submission of information in conjunction with fee applications, will follow the guidelines established by the courts.

20/ For example, in some cases fee applications can be resolved immediately following a decision on the merits in the proceeding in order to permit a simultaneous appeal on the merits and of the fee award. This would prevent piecemeal appeals, and might be appropriate where no disagreement existed over the calculation of the award or where the determination required complete familiarity with the record. See White, supra, 455 U.S. at 454. In other cases, however, it might be preferable to defer attorneys' fees issues until all appeals on the merits have been completed and a final judgment has been entered. This might be appropriate in cases where the determination of attorneys' fees is difficult and likely to consume more time than the appeal on the merits.

Section 7(b) requires that these guidelines provide that attorneys' fees may be awarded only upon final judgments. The meaning of final judgment, including dismissals and so-called "interim awards" in the circumstances outlined by the Supreme Court in Hanrahan v. Hampton, supra, are discussed in connection with section 5(1) of the bill.

Section 8 -- Mootness and Settlement Defenses

Under existing law, a party will be held to be a prevailing party and entitled to recover attorneys' fees and related expenses or costs even if the claim has been mooted, if it is found that the suit was a "catalyst" for the change of policy that rendered the claim moot. See, e.g., Maher v. Gagne, 448 U.S. 122, 129-30 (1980). Subsection (a) would codify the standard by which pending litigation is determined to have been such a catalyst by requiring that the litigation be a "material factor" in the policy change. This is the standard that is currently being applied by most courts. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981). This provision would ensure that courts do not place undue emphasis on chronology -- that is, the fact that the plaintiff's case was pending when the government changed the policy that mooted the suit. Under this provision, governments would be encouraged to carry out planned policy reforms without fear of incurring liability for fees in pending suits, but would still be liable for attorneys' fees unless the government could prove that the suit actually was not a "material factor" in the policy change.

Subsection (b) would deny awards of attorneys' fees and related expenses for services performed after a written offer of settlement by the United States, or by state or local governments, if the party refuses the offer but is ultimately able to do no better when the case is resolved on the merits. This would provide an incentive to governments to make reasonable settlement offers, and encourage parties to give serious consideration to such offers. 21/ This provision would not apply, if, at the time the settlement offer was made, the party's refusal to accept the offer was reasonable. The ten-day

---

21/ Current federal fee-shifting statutes often provide little incentive for parties to settle cases early in the litigation. With respect to cases under 42 U.S.C. § 1988, see Fioretti and Convery, Attorney's Fees Under The Civil Rights Act -- A Time for Change, 16 J. Mar. L. Rev. 261, 277-78 (1983):

> "Aside from the 'prevailing party' issue, the present application of § 1988 results in a lack of incentive for plaintiff's attorneys to enter into pretrial settlements. The more hours the attorney spends on the case, the higher his potential fee award. The motivation then is not to settle, but to proceed to trial, where the hourly rates are even higher.
>
> * * *
>
> "Nor is such a result in the plaintiff's best interests. The purpose of the Civil Rights Act as a whole is to protect those who have suffered a constitutional tort. It naturally follows that if an early settlement is possible, the plaintiff, the protected party under the Act, should be compensated swiftly. However, a plaintiff's attorney, who during the early phase of the litigation has spent relatively few hours in preparation, may lack incentive to settle until compensable hours have reached a significant level. Thus, the overriding goal of the Civil Rights Act is thwarted and litigation is encouraged. The already crowded courts are further congested, so that the taxpayer suffers as well."

requirement and other procedural provisions of Rule 68 of the Federal Rules of Civil Procedure should provide guidance to courts and administrative officers in determining whether the failure of the party to accept the offer was reasonable.

Section 9 -- Comptroller General Report

Section 9 requires the Comptroller General of the United States to submit an annual report to the President and the Congress on the amount of attorneys' fees and related expenses or costs awarded against the United States or against state and local governments under federal fee-shifting statutes in judicial and administrative proceedings. To assist the Comptroller General, courts and agencies should provide whatever information is needed. In preparing this report, the Comptroller General should use the reports prepared under the Equal Access to Justice Act by the Director of the Administrative Office of the United States Courts and the Chairman of the Administrative Conference of the United States, respectively, under 28 U.S.C. § 2412(d)(5) and 5 U.S.C. § 504(e).

Section 10 -- Effective Date

Section 10 applies the provisions of the bill to any award of attorneys' fees and related expenses incurred subsequent to the enactment of the bill. Further, the provisions of the bill apply to actions commenced prior to enactment, but only for attorneys' fees and related expenses incurred after that date.

Senator Hatch. Thank you. E. Richard Larson, the author of a treatise on court-awarded attorney fees, noted that there are well over 100 fee-shifting statutes; you have indicated 129.

Ms. Dinkins. Yes.

Senator Hatch. He states that the most significant of these statutes is the Civil Rights Attorney's Fees Awards Act of 1976, because, as he puts it, "it is the broadest of all fee-shifting statutes."

Now, should S. 2802 be construed in any sense as an attempt to inhibit civil rights litigation?

Ms. Dinkins. Mr. Chairman, we believe that this is not a provision that would inhibit in any way civil rights litigation. We believe rather that it would continue the will of Congress, which is to provide that plaintiffs in this area be able to obtain counsel, but that there be a reasonable limit on the fees that that counsel could receive.

Senator Hatch. I would like to ask two related questions.

First, how did the Justice Department arrive at the $75 per hour limit on fee awards under the fee-shifting statutes? Second, in your opinion, as one of the Nation's leading legal officers, will the rate of compensation of $75 per hour be sufficient to attract competent counsel?

Now, in answering these questions, you may wish to refer to or to mention the hourly compensation of Federal prosecutors.

Ms. Dinkins. We have looked, first of all, at the Equal Access to Justice Act which Senator DeConcini mentioned. That is the cap, the amount, that is provided rather in that particular statute, and we believe that that is a reasonable cap for these types of awards.

But we also believe that these statutes are not intended to be any sort of a lawyers' relief program, but rather that they are intended to provide reasonable fees so that plaintiffs may be able to obtain counsel and be represented.

Even with the $75-an-hour limitation, there have been many lawsuits brought under the Equal Access to Justice Act. That number has not, I think, deterred litigation, and it has not been any sort of a number that would make it difficult for people to be compensated. $75 an hour certainly is less than Wall Street lawyers, for example, would get on an hourly basis, but if you look at the tables that we have provided, you see that there is a large number of awards that are less than $75 an hour. And we think that that would be continuing if this provision passed. It is intended to be a cap and not the amount that would be awarded automatically.

Senator Hatch. The House has approved a bill which adjusts the Criminal Justice Act fees upward, and I think we would both certainly agree that such an increase is clearly warranted.

Should this aspect of the fee, the attorney fee question be addressed independent of the fee-shifting question?

Ms. Dinkins. We believe that it should not be. We think that it is important to link the civil fee-shifting statutes and the Criminal Justice Act, because these are both Federal statutory schemes. They have never been looked at together—but if they are looked at simultaneously, we think that you can get a better balance on both sides.

Senator HATCH. A John Marshall Law Review article makes the point that these fee-shifting statutes discourage settlement in the following terms:

> The more hours the attorney spends on the case, the higher his potential fee award. The motivation, then, is not to settle but to proceed to trial, where the hourly rates are even higher.

How does this bill propose to resolve this type of a problem?

Ms. DINKINS. There is a provision in the bill that would provide that if the attorney rejects a settlement proposal by the Government and then subsequently in trial receives no better a result than what the Government proposed as settlement, that would restrict the recovery by the plaintiff's lawyer.

Senator HATCH. I see. S. 2802 contains a provision permitting reduction by up to 25 percent of any monetary judgment against a defendant, that is, unless hardship would result.

Could you tell us the purpose of this 25-percent provision, or what we would call a 25-percent set-aside provision?

Ms. DINKINS. This provision would apply only in the cases where the plaintiff would receive a monetary judgment, and we believe that it is appropriate in such instances, except where there is a hardship, as you mentioned, that the plaintiff also bear some of the cost of the litigation.

Now, what this would do is reduce the amount of the judgment awarded by up to 25 percent rather than reduce the amount of the attorneys fees. The Government would still pay the attorneys fees.

Senator HATCH. Now, your testimony and other legal commentaries have noted considerable disparities between fee awards even before the same court. For example, some cases have been awarded fees at a rate of $300 an hour while similar cases before the same court received fee awards at a rate of $40 an hour.

Now, what effect would these disparities have on a court-awarded fee system?

Ms. DINKINS. We think that these types of disparities are inappropriate, and that the provisions of this bill would provide better guidance to the courts in setting the attorneys fees so that you would not see that type of disparity.

Senator HATCH. Thank you, Ms. Dinkins. I will turn to Senator DeConcini.

Senator DECONCINI. Mr. Chairman, I am going to be brief; I have some questions I will submit because we have other hearings, I believe, that we are interested in today.

Let me just ask a couple of quick questions.

A study by the auditor general of California shows that every State agency but one hired private attorneys in 1980 to 1982 at rates substantially higher than $75. I don't have any problem with the cap; I am trying to resolve what it ought to be. Many were paid as high as $185, and in one case in California $275 an hour. If the State of California finds that it cannot hire competent outside counsel for $75 an hour, why do you believe that civil rights plaintiffs will be able to do it better?

Ms. DINKINS. Senator, that has not been the experience of the Federal Government. We are able to hire good outside counsel, when we hire outside counsel, at the rate of $75 an hour.

Senator DECONCINI. The other thing that troubles me is that under this legislation you are proposing to permit a reduction or a denial of the fee, as I understand it, if the court determines that the plaintiff's attorney prolonged the litigation—maybe that is not quite the term—or his services were excessive.

Doesn't that put an attorney in a very precarious position as to whether or not he or she should read another case, file another motion, take another deposition, whether or not it might be considered excessive?

Ms. DINKINS. I don't think so, Senator, I believe that this is intended to reach abuses of the system, and that lawyers who in fact have a good-faith, a reasonable, belief that it is appropriate to file additional motions or to continue with a piece of litigation will not be deterred from doing that.

Senator DECONCINI. You don't think a lawyer might say, "Gee, if I go take another six depositions the court might say that that is excessive, and yet in my own conscience I feel like I should go depose those people"?

Ms. DINKINS. I think that lawyers are perfectly capable of weighing whether that is an appropriate course of action in a particular case.

Senator DECONCINI. Yes; but a judge is going to weigh it, not a lawyer; the judge is going to scrutinize that, right?

Ms. DINKINS. Certainly.

Senator DECONCINI. Isn't that what this bill does?

Ms. DINKINS. Yes.

Senator DECONCINI. It permits the judge to make that determination. That is one of the areas that trouble me.

Mr. Chairman, I will submit the balance of my questions, so we can proceed today.

Senator HATCH. Thank you, Senator DeConcini. Thank you, Ms. Dinkins, we appreciate your being here with us.

Ms. DINKINS. Thank you, Mr. Chairman; thank you, Senator.

Senator HATCH. The subcommittee will next hear from a distinguished panel representing the National Association of Attorneys General.

The association's panel will feature its president, Gen. Francis X. Bellotti of Massachusetts—we are happy to welcome you, General Bellotti; its vice president, Gen. Steven Clark of Arkansas; and Gen. David Wilkinson of Utah.

We invite each of you to take a seat before the subcommittee, and, as you are taking your seats, I will mention that the subcommittee will make your written remarks a part of the hearing record, so we would appreciate summarization, if you can.

We will first hear from General Bellotti. In addition to his legal positions as president of NAAG and Attorney General of Massachusetts, General Bellotti has also served as Lieutenant Governor of his State. Moreover, he and his wife enjoy the benefits of 12 children, so we are honored to have you here and to welcome you.

Our second witness will be General Wilkinson, whom I welcome as a friend as well as a noted attorney general. General Wilkinson has been an outstanding attorney general for Utah since 1980, and he has also been a national leader in this attorneys-fees issue as a participant in the first hearings held on this subject by this subcommittee back in 1981.

So, Dave, it's a pleasure to have you before the subcommittee as well.

The final member of the NAAG panel is the association's vice president, Gen. Steven Clark of Arkansas. General Clark has served Arkansas as attorney general since 1978. Before his service as attorney general, Mr. Clark was a professor and assistant dean at the Arkansas School of Law. He brings to the subcommittee excellent academic as well as pragmatic credentials. We appreciate having all three of you here.

I have to mention to you that Senator Thurmond has assigned me to chair another hearing downstairs two floors below, which starts at 10 o'clock, so I will have to leave. I don't know how long you can stay, Senator DeConcini.

Senator DECONCINI. I have to leave at 10 o'clock also.

Senator HATCH. We both have to leave about the same time, so I am going to have to ask counsel to conclude the hearing for us so I can fulfill both obligations this morning. I don't want you to feel like we are ignoring this, because I feel very deeply about this bill, and Senator DeConcini on the other side feels deeply otherwise, and we will just have to see where we go from here. Generally we get together, so we hope we can on this matter.

But your testimony will be particularly important to us, and please forgive us if we have to interrupt you so we can leave, and allow our counsel, Mr. Rader, to finish and conclude the hearing.

General Bellotti, we will turn to you.

[The following were received for the record:]

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
Washington, D.C. 20530

November 28, 1984

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your letter of September 20, 1984, which enclosed written questions from Senator DeConcini concerning S. 2802, the Legal Fees Equity Act. This discussion should be read together with my written statement submitted on September 11, which discusses these issues in greater detail, and with the Section-by-Section Analysis of S. 2802 prepared by the Department of Justice in proposing S. 2802. For convenience, each question is reprinted together with the response.

> QUESTION 1: Under this piece of legislation the civil rights attorney representing plaintiff is limited to $75/hr. maximum without multipliers or bonuses, receives no award if plaintiff does not prevail, and can have the reward reduced if the court feels plaintiff's attorney unreasonably prolongs the litigation, or services were excessive, or the award would unreasonably exceed the hourly rate of a salaried attorney. If the Civil Rights Attorney's Fees Act of 1976 was created to further civil rights litigations, isn't it suggested by a reading of S. 2802 that this is an attempt, either consciously or not, to reduce incentives to pursue civil rights litigations?

ANSWER: At the outset, I must note that this bill as drafted would apply not merely to civil rights actions, but to all federal statutes that provide for an award of attorneys' fees against federal, state, or local governments. The intent of the bill is to treat all civil actions precisely the same with respect to the award of attorneys' fees against the government.

Specifically in response to Senator DeConcini's question, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) to improve the ability of individuals to enforce the civil rights laws by reducing the financial barriers that might otherwise deter disadvantaged plaintiffs from bringing meritorious suits to vindicate their civil rights. To do so, Congress provided that the courts may award to a successful civil rights plaintiff "a reasonable attorney's fee." In the words of the Senate Report on § 1988, the fee awards should be ones that are "adequate to attract competent counsel, but which do not produce windfalls to attorneys." 1/

We believe that the intent of Congress to provide a reasonable attorneys' fee is of central importance. Unfortunately, however, because Congress has failed to specify with any precision the contours of a reasonable attorneys' fee, the various federal courts have been awarding fees at widely divergent levels -- some rather low and others unconscionably high -- and have applied a number of other inconsistent standards as well. In evaluating the experience of the courts in awarding attorneys' fees against governments at various levels, we have come to the firm belief that greater guidance from Congress is essential to redress that divergence, to rein in the occasional award of inordinately high hourly rates, and to reduce the incentives for counsel to waste judicial resources by conducting what amount to entirely separate proceedings in the hope of obtaining an unusually large fee award.

To address these concerns, S. 2802 would establish more uniform rules to guide the determination of fee awards. None of the rules in S. 2802 is novel; as the following paragraphs indicate, each is adapted from a statutory or case law precedent.

Prevailing on the Merits. The various fee-shifting statutes, including 42 U.S.C. § 1988, all require that a party must achieve some degree of success on the merits in order to obtain any award of attorneys' fees. See Hensley v. Eckerhart, 103 S. Ct. 1933 (1983); Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983). Thus, Congress itself has consistently made the judgment that parties who do not prevail in litigation should not receive an award of fees. S. 2802's requirement that the party seeking fees must have prevailed on the merits is in no sense imposing a new limitation on attorneys' fee awards. Rather, it would simply provide a greater measure of uniformity in

---

1/ S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976). See also Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980) (the fee-shifting statutes were not designed to "create a . . . fee bank to be liberally drawn upon by lawyers for their own welfare").

determining success on the merits, reduce ambiguity, and discourage non-meritorious litigation.

Hourly Rates. We reject any contention that the adequacy of enforcement in civil rights actions or any other actions can be measured by how high an award of attorneys' fees is made in each such case. Congress has sought to provide for the award of attorneys' fees that are adequate to attract competent counsel, but not so high as to result in windfalls to particular attorneys. Fee awards should not be paid at the same hourly rates demanded by the highest-paid corporate lawyer, but at rates that fairly compensate counsel for the legal services provided and offer adequate incentives for plaintiffs to bring suits vindicating their rights.

The provision in S. 2802 limiting fee awards to no more than $75 an hour more than satisfies this standard. The materials provided with my testimony (Tables B, C, and D) show that courts frequently have awarded fees at an hourly rate of $75 or less to attorneys who brought suits under various statutes, including civil rights actions. These tables clearly indicate that plaintiffs can attract competent counsel for $75 an hour or less. At this rate, attorneys who bill 1,500 hours a year would earn $112,500 annually.

This $75 hourly rate is based on the Equal Access to Justice Act, 28 U.S.C. §§ 504 and 2412(d). There, Congress recently determined that a general limit of $75 an hour was necessary and appropriate to forestall skyrocketing legal fee awards, yet was adequate to ensure quality representation. Experience under the EAJA demonstrates that a maximum rate of $75 per hour for attorneys' fee awards has been sufficient to attract competent counsel.

We also believe that the hourly rate of a salaried attorney is a relevant consideration in setting the reasonableness of the hourly rate. We are troubled by the application of the "prevailing market rate" system that ignores the true cost of legal services in favor of a hypothetical determination of the "value" of the attorneys' services. Taken to its logical conclusion, this system can easily lead to such abuses as the district court's decision in Laffey v. Northwest Airlines, Inc., which awarded attorneys' fees to counsel at higher rates than those attorneys had ever charged their private clients. 2/

Bonuses and Multipliers. S. 2802 would also eliminate bonuses and multipliers because, contrary to the spirit and

---

2/ 572 F. Supp. 354 (D.D.C. 1983), rev'd, No. 83-1838 (D.C. Cir. Sept. 28, 1984). In addition, the district court had supplemented those inflated hourly rates with a 50% multiplier.

intent of the various attorneys' fees statutes, they tend to promote meritless litigation and provide windfalls to attorneys.

The Supreme Court has concluded that bonuses and multipliers generally should not -- on the basis of such factors as the quality of representation, the results obtained, and the novelty and complexity of issues -- be used to increase an hourly rate the courts have already found reasonable. See Blum v. Stenson, 104 S. Ct. 1541, 1548-49 (1984). We agree. All of these considerations are normally reflected in the calculation of the hourly rate or in the number of hours reasonably expended on the case. Congress concluded as much in enacting the Equal Access to Justice provisions which preclude award of multipliers.

Another rationale commonly given for multipliers, the risk of not prevailing in a case, is also quite inappropriate as the basis for a multiplier or bonus. The purpose of such a "contingency" bonus is to compensate indirectly counsel for cases in which the plaintiff does not prevail by overcompensating counsel for the cases in which the plaintiff does prevail. We believe that this circuitous method of compensating counsel for the expenses of lost cases directly conflicts with the intention of Congress to impose the obligation of attorneys' fees only in those cases where the plaintiff in fact prevails. In those cases where the party does prevail, there is no longer any "contingency" on the question of success on the merits. In those cases, the government should be required to pay only the actual expenses of counsel in that case, not an additional amount designed to compensate counsel for the "contingency" that counsel might not have prevailed in that case or won't prevail in some other case.

As the D.C. Circuit recently observed on this issue:

> "Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorneys' fees is not unlike compensating an attorney for unsuccessful claims; it hedges the statute's requirement that only prevailing parties may recover attorneys' fees."

Murray v. Weinberger, No. 83-1680 (D.C. Cir. Aug. 24, 1984) (slip op. at 14). We believe that the requirements that Congress has imposed should be respected, not circumvented, and we do not accept the argument that adherence to the requirements Congress has established would undermine enforcement of the laws that provide for an award of attorneys' fees.

Reduction of Fee Awards for Unreasonably Prolonging Litigation or for Excessive Services. Finally, we fully support the provisions in S. 2802 authorizing the courts to reduce an award of attorneys' fees in those cases where the counsel for the prevailing party had unreasonably prolonged the litigation or had indulged in legal services that were plainly excessive in the context of the litigation. Frankly, we would anticipate that in most cases the litigants and the courts are already vigilant in addressing such forms of abuse in the litigation process, but believe that these principles should be plainly stated. As the Supreme Court declared in Hensley v. Eckerhart, 103 S. Ct. at 1939-40:

> "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission."

We do not believe that authorizing courts to supervise counsel's adherence to these ethical principles would in any way deter appropriate litigation efforts.

> QUESTIONS 2 and 6: Is it necessary to limit the discretion of the Judiciary to determine the appropriate award for attorney's fees? Attorney General Clark cites an example of an outrageous request in his testimony, but he also indicates that the judge in the case looked beyond the request to determine what was a reasonable award.

ANSWER: The lack of clear statutory guidance to the courts in awarding attorneys' fees has resulted in widespread confusion over the proper bases for fee awards, an increasing incidence of inordinately high fee awards, an irrational disparity in the awards of fees, and a growing burden on the courts and litigants due to expensive, unproductive litigation over attorneys' fee issues. As I stated in my testimony, our research indicates that there are some cases in which judges have clearly abused their discretion in setting attorneys' fee awards, and these abuses need to be curtailed.

S. 2802 is intended in part to limit judicial discretion in awarding fees and, more fundamentally, to assist courts in the exercise of that discretion by establishing clear, rational standards and by elucidating the true intent of Congress in enacting the attorneys' fee statutes. This type of guidance should ensure greater uniformity in the application of these statutes and reduce the incentives for counsel to litigate attorneys' fee issues out of a hope of obtaining an unusually large fee award.

QUESTION 3: Don't government entities hire outside law firms for litigations with the understanding that these firms will receive payment whether or not the decision is in favor of the defendant or not? Aren't these firms paid in excess of the $75 figure? Why should we hold the attorney of the plaintiff up to standards that the government does not meet?

ANSWER: The federal government generally conducts litigation through attorneys employed by the Department of Justice or by other federal agencies. In some circumstances, however -- for example, in so-called _Bivens_ suits where there may be a conflict of interest -- the Department does retain private attorneys to defend a federal agency or government employees. Those private attorneys are paid for their services whether or not the decision favors the government.

We take issue, however, with the contention that the government should also pay attorneys' fee awards under civil fee-shifting statutes regardless of the degree of success on the merits. When the federal government retains private counsel, it is to defend an action brought against it or its officials. There is a fundamental difference between having the government pay its _own_ counsel in litigation regardless of success on the merits, and having the government pay the attorneys for _both_ sides in litigation regardless of the merits. The prospect of having to pay a fee award, and other adequate (political) constraints, already discourage the government from litigating non-meritorious positions, but the government should not similarly be deterred from defending _meritorious_ positions.

As I noted above, Congress has uniformly decided to provide for compensation of private attorneys, under fee-shifting statutes, only in those cases and for those issues on which they achieve some degree of success on the merits. To do otherwise would dramatically reverse the intent of Congress to facilitate the efforts of plaintiffs to vindicate _meritorious_ claims.

This emphasis on compensating only meritorious claims is fully justified. If private counsel were guaranteed an award of attorneys' fees in all litigation under fee-shifting statutes without regard to success on the merits, attorneys would be given the incentive simply to file as many suits as possible, regardless of the possibility of success, because someone else -- the government -- would pay the bill in any event. Unlike the government, which always must bear at least its own litigation costs, the plaintiff and his or her counsel would _never_ have to bear the costs of the litigation. Under that system, there would be essentially no disincentive to deter the bringing of frivolous suits that would clog the courts and place unwarranted burdens on the defendants to defeat such efforts. Such suits would vindicate no one's rights, but would only generate windfalls for enterprising attorneys and make the prompt litigation of meritorious claims much more difficult.

Moreover, when the federal government hires outside counsel, it does not recognize the "prevailing market rate" approach in determining their compensation. Instead, when the Department of Justice retains private counsel on behalf of any federal agency or official, it adheres to an administrative directive limiting the attorney's compensation to not more than $75 per hour. Of course, that hourly rate far exceeds the hourly compensation of attorneys employed directly by the federal government -- even when fringe benefits, support services, and overhead costs are included.

Thus, in our view, the pertinent question is why in many cases counsel who sue the government are compensated by the taxpayers at vastly higher rates than are the attorneys who represent the government. The federal government already bears the cost of its own attorneys' fees, and we believe that a reasonable limitation on attorneys' fee awards is needed to redress this imbalance.

> QUESTION 4: S. 2802 includes several provisions which would limit or prohibit attorneys' fees after a settlement offer is refused if the final outcome is similar to the offer refused. If, as is the case in many cases brought against governments, the remedy sought is injunctive relief, how would you compare different kinds of injunctive relief for the purpose of complying with these provisions?

ANSWER: Section 8(2) of S. 2802 provides that no award of attorneys' fees and related expenses subject to the provisions of the Act may be made "for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that . . . the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and . . . the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred." Clearly, this provision would most often come into play in the context of an award of damages. In that context, the application of this provision should be quite straightforward and, indeed, the courts have long applied the sanction provisions of Rule 68 of the Federal Rules of Civil Procedure to make similar kinds of determinations.

We do not believe that the provision should necessarily be limited to instances of monetary relief. The courts should also be able to administer this provision without undue difficulty even where the remedy sought, or the relief offered by the defendant or granted by a court, is injunctive in nature. The provision would not have any effect at all, of course, unless the offeror raises the issue and the court determines that it is possible to establish that the injunctive relief ultimately obtained by the prevailing party is less favorable than the rejected offer of judgment. A determination of whether one form of injunctive relief is less favorable than the relief offered by a defendant can, in all but the rare case, be made on the basis of the nature of the complaint in the case and the types of relief sought. Where a court enters an injunction requiring the defendant to do, or to cease doing, fewer activities than the defendant itself had offered, the judgment should be considered less favorable. In the rare case where the court orders injunctive relief completely different from what the defendant offered, it should nevertheless be able to determine whether the plaintiff is better off, worse off, or the same as he would have been had he accepted the defendant's offer.

Some courts have already faced this precise problem under Rule 68 of the Federal Rules of Civil Procedure, on which § 8(2) of S. 2802 is patterned, and have applied Rule 68 even when equitable remedies were offered by the defendant or ordered by the court. 3/

> QUESTION 5: Does it concern you that S. 2802 might put an attorney in an ethical bind if he has to start weighing the chances of his client receiving attorney's fees if litigation is to continue against the best interests of his client?

ANSWER: We do not perceive any ethical dilemma in the situation you describe. S. 2802 would not impose new obligations on attorneys to weigh these competing considerations; it simply codifies and makes uniform the standards that the courts are already applying in this context.

The federal fee-shifting statutes are designed to enable indigent parties, small businesses, victims of discrimination, and others to attract competent counsel to vindicate meritorious claims; they were not intended to provide blanket compensation for any claim such plaintiffs might bring. Accordingly, these statutes provide for the award of fees only to a party who achieves some specific degree of success on the merits of a particular claim. See Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983); Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

3/ See, e.g., Liberty Mutual Insurance Co. v. EEOC, 691 F.2d 438 (9th Cir. 1982) (court ultimately found state's offer to consent to judgment under Rule 68 enjoining it from disclosing information made confidential by law to be as favorable as injunction entered by the court against the state); Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 495 (D.N.D. 1982), aff'd, and modified on other grounds, 713 F.2d 1384 (8th Cir. 1983) (offer of judgment found not as favorable as equitable relief finally obtained because offer failed to address several critical areas in which court ordered relief).

Under current law, therefore, an attorney who hopes to be compensated under one of the federal attorneys' fee statutes has to decide whether his client's claim is meritorious and whether he is likely to prevail. In other words, the attorney already must weigh the chances of his client's prevailing (and receiving attorneys' fees) in order to determine what the best interests of his client are. Indeed, any attorney's professional obligation requires him to weigh the client's potential for success in determining whether to advise that client to proceed with litigation.

In our view, this principle is fully justified, for we perceive no public interest whatsoever in encouraging attorneys to pursue non-meritorious claims simply in the hope of receiving attorneys' fees. The purpose of S. 2802 is merely to establish uniformity and avoid any unnecessary confusion.

* * *

In conclusion, I appreciate the opportunity to respond to these questions and to restate the Department's position in support of S. 2802. The Department would be pleased to provide further information during the consideration of these important issues in the next Congress.

Sincerely,

Carol E. Dinkins

Carol E. Dinkins
Deputy Attorney General

cc: Senator Dennis DeConcini

ANALYSIS AND PERSPECTIVE

ATTORNEYS' FEES

Reform of Civil Rights Fee Award Practices Needed

By Jonathan C. Rose,
Kevin R. Jones,
and Bradley L. Kelly

Mr. Rose, formerly assistant attorney general in charge of the Office of Legal Policy at the Department of Justice, will join the partnership of Jones, Day, Reavis & Pogue in Washington, D.C., on April 1. Mr. Jones is a deputy assistant attorney general and Mr. Kelly is an attorney-adviser in the Office of Legal Policy. The authors helped prepare the Legal Fees Equity Act, which is being introduced in this session of Congress.

In recent years, attorneys' fee awards against government parties have risen dramatically, largely as a result of judicial allowance of excessive billing rates for attorneys.[1] One current case that has attracted considerable publicity, *Grendel's Den Inc. v. Larkin*,[2] exemplifies some of the problems reflected in many attorneys' fee cases that have led to this dramatic rise in government liability.

In *Grendel's Den*, Professor Laurence Tribe of Harvard petitioned the district court for $332,441 in attorneys' fees—a billing rate of $275 per hour—after he had successfully urged the U.S. Supreme Court to strike down a Massachusetts law that allowed churches and schools to veto liquor licenses for neighboring businesses.[3] Although Tribe incurred very little of the overhead expenses of attorneys in private practice, he insisted that this rate was reasonable because comparable practitioners in the community charged similar rates for comparable work, and in fact was modest compared with the rates charged by senior partners in leading Boston law firms. He also requested a bonus of 50 percent, for an effective hourly rate of $412.50. Tribe provided only very sketchy documentation of the number of hours he actually spent on the case, and subsequently characterized the keeping of detailed time records as "a stupid waste of time."[4]

Massachusetts Attorney General Francis X. Bellotti expressed outrage at Tribe's fee petition, which was based on the Civil Rights Attorney's Fees Awards Act of 1976,[5] and opposed it as unreasonable and excessive. A Washington Post editorial sympathized with Bellotti's objection to the fee request, and observed that the state of Massachusetts had been asked to pay "a pretty hefty fee for a moonlighting academic who wins a liquor license case."[6] Indeed, although $275 per hour—and certainly $412.50—would be a profitable billing rate even by major law firm standards, it would appear to be exceptionally remunerative in the case of a law school professor who does not incur the high overhead costs that most law firms must structure into their hourly rates.

Although the Grendel's Den case has not yet been resolved,[7] it neatly exemplifies the growing problem of requests for excessive hourly rates, the abuse of bonuses and multipliers to inflate these rates, and the need for considerable litigation to resolve attorneys' fee disputes caused by the absence of clear guiding principles. It also illustrates the manner in which state and local governments have been called upon to fund, without limit, the exercise of federally created rights.

The article examines in detail some of the problems that have arisen under current fee-shifting statutes, and analyzes a proposed legislative response to these problems. In order to bring greater fairness, clarity, and rationality to awards of attorneys' fees against federal, state, and local governments under federal statute, the Department of Justice is supporting legislation to be introduced by Sen. Orrin G. Hatch (R-Utah) in this session of Congress. The department's bill would set attorneys' fees in civil cases at levels sufficiently high to attract competent counsel but not so high as to create windfalls for lawyers, and would raise the pay for federal court-appointed criminal lawyers to a level more closely commensurate with that of civil attorneys. The bill also would establish uniform standards for determining when an award of attorneys' fees is appropriate in federal fee-shifting suits against government parties, uniform procedures for processing attorneys' fee petitions and awards in these cases.

With but one exception, Congress has imposed no specific ceilings on the attorneys' fees recoverable against government defendants.

Under the "American Rule" of attorneys' fees developed at common law, "the prevailing litigant ordinarily is not entitled to collect a reasonable attorneys' fee from the loser."[8] In recent years, however, Congress increasingly has enacted statutory exceptions to the American Rule that apply in many types of civil litigation. Approximately 129 federal statutes now provide for awards of attorneys' fees, separate and apart from the amount of any monetary judgment, to parties in civil actions in the courts and in administrative proceedings.[9]

Many of these statutes authorize recovery of attorneys' fees against federal, state, and local governments. Congress has provided that taxpayers should bear the cost of attorneys' fees of opposing parties in many cases in order to remove some of the disincentives for individuals to pursue certain types of lawsuits thought to advance important public interests, in which the costs of litigation otherwise might preclude parties from vindicating their rights.

Although the federal fee-shifting statutes were designed to serve admirable goals, serious problems and substantial judicial confusion have marked their implementation. In the name of providing competent counsel to certain individuals, attorneys frequently have sought to further their own financial interests by urging courts to award fees at inappropriately high billing rates and to augment awards with bonuses and multipliers. In civil fee-shifting suits against government parties, taxpayers increasingly must bear the costs of paying attorneys' fees that unreasonably exceed the compensation paid to court-appointed counsel in criminal cases, and to government lawyers. This practice can have the coercive impact, particularly on small municipalities, of encouraging socially questionable settlements to avoid enormous litigation costs.

Tribe's fee request for his own time, for example, works out to $264,206, calculated at a rate of $275 per hour (increased to $412.50 per hour through a multiplier) for the 640.5 hours he billed. To put this in perspective, a criminal attorney who represents an indigent defendant in a felony case in the same district court that considered *Grendel's Den* is limited by the provisions of the Criminal Justice Act[10] to hourly compensation of $30 for time in court, and $20 for time out-of-court. Total compensation for the entire case through trial is limited to $1,000. The act also limits the court-appointed criminal attorney's compensation for handling an appeal of the case to an additional $1,000. The same court-appointed lawyer would do only slightly better in a Massachusetts state court, in which court rules limit the hourly rate for appointed counsel to $35 for in-court time and $25 for out-of-court time.[11] The hourly rate requested by Tribe in *Grendel's Den* also contrasts sharply to the salaries of attorneys employed by federal, state, and local governments.

Although Congress seemingly did not foresee the advent of skyrocketing attorneys' fee awards in civil suits against government parties—of which the *Grendel's Den* petition is illustrative—these awards largely have resulted from Congress' failure to provide adequate guidelines. With but one exception,[12] Congress has imposed no specific ceilings on the attorneys' fees recoverable against government defendants. Moreover, with the same exception, federal fee-shifting statutes provide virtually no guidance for the interpretation and implementation of their mandates, and they differ greatly in the guidance they do provide. For example, these diverse statutes neither establish a uniform method for determining when a party is eligible for attorneys' fees, nor offer uniform procedures for processing attorneys' fee requests and awards. As a result, courts often have reached conflicting and confused conclusions in fee-shifting cases, and have wasted valuable judicial resources trying to determine the standards that should govern these cases. The result, all too often, is an alarming disparity among attorneys' fee awards that defies reason.

Congress has provided in most fee-shifting statutes that awards of attorneys' fees at least be "reasonable."[13] It is fair to assume that Congress, in so doing, did not intend federal fee-shifting statutes to make "the private attorney general's position so lucrative as to ridicule the public attorney general."[14] Moreover, Congress has expressly indicated that courts should not interpret federal fee-shifting statutes so as to confer windfalls on attorneys.[15] Courts therefore should heed The Washington Post's sensible proposition that "[j]ust because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous."[16]

Although some courts have interpreted the statutory directive that fee awards be reasonable as supporting attorneys' fees as low as $12 per hour[17] or $25 per hour,[18] the courts increasingly have equated a reasonable attorneys' fee with the fees commanded by major corporate law firms in the area, and have geared attorneys' fee awards to these rates.[19] In so doing, courts have construed these statutes to support rates of pay for private attorneys substantially higher than those of the government lawyers working on the same case.[20] Other courts have bestowed windfalls on attorneys by awarding attorneys' fees at rates exceeding the rates the attorneys normally charge other clients,[21] and in amounts exceeding what the attorneys had agreed to accept pursuant to a contingent fee agreement.[22]

Contingency factors in a suit also do not warrant the use of a multiplier to inflate the fee award. Because recovery of fees in all fee-shifting cases requires at least some degree of success on the merits,[23] such recovery is necessarily contingent in every case. Compensation for this contingency as a matter of course would, however, violate the Supreme Court's instruction in *Hensley* that bonuses be used only in exceptional cases. In addition, widespread use of bonuses to offset risk factors would serve to compensate attorneys for their expenses in cases in which Congress has not authorized the award of attorneys' fees. The rationale for awarding enhanced fees to attorneys in cases in which they *have* achieved the requisite degree of success on the merits is to permit them to use the bonus element of the award to underwrite cases in which they have *not* satisfied the requirements for success on the merits. The bonus thus subsidizes cases Congress intended not to subsidize.

Under the so-called American Rule, 'the prevailing litigant ordinarily is not entitled to collect a reasonable attorneys' fee from the loser.'

In addition, the use of contingency bonuses in cases in which the likelihood of recovery is sufficiently uncertain that added incentive is necessary to attract competent counsel could well have the perverse effect of penalizing the most those defendants whose conduct is least blameworthy, since the cases in which the contingency factors are greatest are often the cases in which the defendant's liability is a very close question.

Finally, the use of multipliers to compensate counsel for delays experienced

Continued on page 16

ANALYSIS AND PERSPECTIVE

Figuring Attorneys' Fees Provokes Lengthy Disputes

Continued from page 13

in receiving payment of attorneys' fees is not properly the function of federal fee-shifting statutes. Such multipliers are tantamount to prejudgment interest on the attorney's fee, which generally is not allowed against the United States. Even if allowable, compensation for delays in payment is more properly calculated in suits against government parties in accordance with statutory and procedural guidelines for awarding interest on judgments against the United States.

Blum v. Stenson, which is before the Supreme Court this term, also challenges the propriety of a 50 percent multiplier awarded to a nonprofit legal services organization. Subsequent to its decision in *Blum*, the 2nd Circuit observed in *Carey* that the award of a contingency multiplier to a nonprofit organization is especially inappropriate. Whether or not a risk factor bonus might be appropriate to reward private counsel who has taken on a constitutional rights case with dubious prospects, the promise of such a reward would not appear to be necessary to secure the participation of a nonprofit organization established to handle precisely such cases.

Federal fee-shifting statutes define a number of different formulations for determining when a party qualifies for attorneys' fees. Thus, depending on the fee-shifting statute invoked, fees will be available when a claimant is the "prevailing party," "where appropriate," or when "in the interests of justice." These divergent guidelines have inspired understandably inconsistent judicial interpretations.

Confusion in the courts as to when attorneys' fees will lie in a case has spurred the Supreme Court to offer guidance on this issue. Last term, in *Ruckelshaus v. Sierra Club*, the Court overturned a lower court's award of attorneys' fees to plaintiffs who had lost every issue on the merits in a suit based on a statute that authorized an attorneys' fee "where appropriate." In *Hensley v. Eckerhart*, the Court held that a statute that authorizes attorneys' fees for prevailing parties would not support an award of fees for work on specific issues on which the litigant did not prevail.

Although the Court's decisions in *Ruckelshaus* and *Hensley* have lent some clarity to the question of when a party qualifies for attorneys' fees, they are hardly the last word on the subject. Questions remain unanswered, both under the statutory standards addressed in those cases, and under other statutory formulations not yet addressed by the Supreme Court. It is unclear, for example, when an award is authorized under the "where appropriate" standard addressed in *Ruckelshaus*, but not under the "prevailing party" standard discussed in *Hensley*, how other standards, such as the "in the interests of justice" standard, are like or unlike the "where appropriate" and "prevailing party" standards, and, indeed, whether any rational basis can justify this plethora of dissimilar standards for awarding attorneys' fees in the first place.

The Department's bill would eliminate this confusion in suits against government parties under federal fee-shifting statutes by establishing a uniform standard for recovery of attorneys' fees in these cases. The bill would require that the party prevail on the merits—either at trial or through a favorable settlement—in order to qualify for attorneys' fees. In keeping with the Supreme Court's decision in *Hensley*, the bill also would disallow fees for work on specific issues on which a party did not prevail. Fees would, however, lie for work on meritorious issues that a court found unnecessary to address in light of a favorable ruling on a related issue.

Given the differing interpretations of appropriate hourly rates and the requisite degree of success, and the many other areas of potential disagreement among parties, the process of calculating attorneys' fee awards can generate prolonged dispute. The fee award stage of the litigation may even threaten to overshadow the merits of the case itself. The expenditure of judicial time in resolving these disputes, by common agreement, involves little social utility. Therefore, the establishment of rules of general applicability to reduce the bases of disagreement among parties should be a principal goal of attorneys' fee award reform.

> *Awards based on prevailing firm rates generally focus on the fee that the top lawyers in an area can command, rather than on the fee that is sufficient to attract competent counsel.*

With the exception of the Equal Access to Justice Act, federal fee-shifting statutes currently fail to prescribe clear-cut and uniform procedures for processing attorneys' fee applications and awards. For example, these statutes define no uniform rule to govern the time in which a fee petition must be filed in a case, and courts have been unable to agree on an appropriate filing time. These statutes also offer no instruction on the type and amount of documentation required to support a fee request. As a result, courts have had to deal on one hand with fee requests of hundreds of thousands of dollars that are unsupported by contemporaneous time records, and on the other hand, have been overwhelmed with excruciatingly detailed documentation.

In response to such problems, the department's bill would establish a 30-day time limit for filing fee applications, which is the same filing time set out in the Equal Access to Justice Act. In other respects, the bill would aid the disposition of fee applications by more carefully defining the guiding principles for fee awards, as discussed above. The limit of $75 per hour also should eliminate much of the dispute over attorneys' fees awards when the prevailing commercial rate exceeds that figure.

The purpose of the bill in this respect is to provide more common ground and to diminish the areas of disagreement among parties, thereby promoting prompt settlement of attorneys' fee requests. The present system—which involves considerable uncertainty because of the wide discretion of district judges, disagreement over applicable standards, and the possibility of huge bonuses over and above actual costs—well may deter early settlements of attorneys' fee requests, and indeed, may deter early settlement of the merits of the case itself. The current system's perverse incentives to litigate such questions must be eliminated. As Justice William J. Brennan Jr. observed in *Hensley*, attorneys' fee litigation all too often "serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets."

Rather than spell out statutory standards for the other procedures for attorneys' fee applications, the department's bill would direct the courts to develop uniform procedures and standards. This will provide much needed guidance to the courts—and more importantly, to the parties—as to the prerequisites for fee applications, while maintaining needed flexibility for the courts over time in setting these standards.

Despite energetic judicial efforts to administer a patchwork quilt of federal fee-shifting statutes in a rational way, awards of attorneys' fees increasingly have been marked by unpredictability, inequity, and waste of judicial resources. Unpredictability results when courts espouse different views on when and how fee petitions should be filed, when a party qualifies for attorneys' fees, and what constitutes a reasonable fee. Inequity results when courts bind parties to disparate procedural requirements, or make fee awards that are consistently out of line with rates paid Criminal Justice Act attorneys and government lawyers, and that arbitrarily bestow bonanzas on attorneys in some cases. Judicial inefficiency results when judges are forced to devote substantial effort to defining the legal standards governing attorneys' fee awards without adequate guidance from fee-shifting statutes.

By establishing a uniform billing rate for fee-shifting suits against government parties, prescribing clear standards for determining eligibility for a fee award, and calling for specific procedures to govern fee-shifting cases, the department's bill would promote greater fairness, predictability, and efficiency in the current scheme of federal attorneys' fee statutes. In so doing, the bill should increase public acceptance of the many laws that authorize compensation of private attorneys from the public treasury. As a final matter, the department's bill might motivate Congress to take a close look at its obligation, as the popularly elected branch of government, to offer clear guidance on the policy issues arising in the context of fee-shifting statutes, rather than simply leaving resolution of these issues to the unfettered discretion of life-tenured members of the judicial branch.

Awards routinely based on prevailing firm rates generally focus on the fee that top lawyers in an area can command, rather than on the fee that is sufficient to attract competent counsel. Yet, a reasonable attorneys' fee should compensate parties only for the cost of obtaining "competent counsel worthy of a contest with the caliber of counsel available to their opposition," and not for the cost of hiring the highest-paid lawyers in the community. Thus, in *Grendel's Den*, the state of Massachusetts should not have to pay the high billing rate commanded by one of the country's preeminent constitutional scholars, but rather a rate that could retain competent, if less renowned, counsel.

The government's obligation in civil fee-shifting cases should be identical to its longstanding obligation in actions under the Criminal Justice Act, in which the same hourly rates apply to a recent law school graduate as to the nation's most seasoned criminal defense lawyer. The government's responsibility is to ensure that every party with a meritorious claim is afforded access to reasonable assistance of counsel, not to issue a "blank check" to those parties who feel that only the best will do.

Nor is a blank-check approach to attorneys' fees warranted simply because a court decides that a case raises important or interesting questions of law. One commentator on *Grendel's Den* argued that the astronomical attorneys' fee request in that case was appropriate because "our society should attract top legal talent to represent the Bill of Rights." But this view ignores the fact that the government is not required to offer such lofty compensation to government and criminal lawyers who continually defend the Bill of Rights in Criminal Justice Act cases. The government should not be required to pay top fees in civil cases to defend its opponent's interpretation of the Constitution or federal statutes against government attorneys who receive a much lower rate of pay. This was not Congress' intent in authorizing reasonable attorneys' fees in certain classes of suits.

To award one party higher attorneys' fees than are required to secure competent counsel because a case raises particularly interesting issues prejudices not only the other party to the litigation, but also other litigants whose claims do not strike the court's fancy. Particularly when attorneys' fees are calculated only after the merits of a case are resolved, no justification exists for the award of excessive attorneys' fees based on the nature of the case. The client in whose name the suit was brought can receive no further benefit on his or her claim, and the only one to profit is the attorney.

In the same way that attorneys in appeals under the Criminal Justice Act receive the same compensation whether they grapple with intricate and unique constitutional arguments or deal with mundane factual and procedural questions, pay for civil attorneys in fee-shifting cases should be based on the needs of individuals, and not on a court's evaluation of the significance of the issues presented.

In order to make court awards of attorneys' fees in suits against government parties fairer and more predictable, the department has proposed to fix the maximum rate of compensation in civil fee-shifting cases at $75 per hour. This is the rate Congress recently adopted as reasonable in the Equal Access to Justice Act. A fixed $75-per-hour rate is well above what the federal government pays its own attorneys, and should be sufficient to attract compe-

Continued on page 17

ANALYSIS AND PERSPECTIVE

Case Complexity, Novelty Should Not Boost Fee Award

Continued from page 16

tent counsel. In addition, the fixed rate should promote judicial economy by relieving courts of the burden of continually trying to define a reasonable rate in fee-shifting cases, and should eliminate windfalls to attorneys at the taxpayers' expense.

The bill also would double the current Criminal Justice Act rates of $30 and $20 per hour, as well as the overall compensation limits of $1,000 for a felony trial, $1,000 for an appeal, and $440 for a misdemeanor trial. The bill's $60- and $40-per-hour rates would provide dramatic relief for Criminal Justice Act attorneys. By contrast, court-appointed lawyers in the District of Columbia who were striking for higher pay rates last summer eventually settled for a flat $35-per-hour fee for work in and out of court.[26] Indeed, the new CJA compensation rates would put the federal government virtually at the top of the scale for compensation of appointed criminal attorneys across the country.[27]

A special problem with basing attorneys' fees on prevailing large firm rates arises in cases involving parties with low, fixed costs for legal services, such as nonprofit legal services organizations. Because these organizations typically incur far lower expenses than do large firms, payment to nonprofit law offices of the same rates charged by private firms inevitably results in substantially higher net benefits and enhances the risk of impermissible windfalls. The billing rate for a private firm typically embraces three components: attorney compensation, allowable overhead, and a profit factor.[28] Use of private rates to determine a reasonable fee thus invariably overcompensates the nonprofit organization: Since nonprofit groups by definition do not seek profit, "the profit component is a questionable ingredient in a reasonable fee for a nonprofit law firm," and the remaining two components are almost always much higher for a private firm than for a nonprofit law office.[29]

Fee awards to nonprofit organizations have precipitated a split within the 2nd Circuit in two recent cases. In *Blum v. Stenson*,[30] the 2nd Circuit affirmed a lower court decision that had awarded legal aid lawyers fees of $95 to $105 per hour—rates well in excess of the attorneys' actual hourly rates of compensation. In *New York State Ass'n for Retarded Children Inc. v. Carey*,[31] however, the same court set aside as "so inordinately generous as to be unreasonable" the district court's award to a nonprofit law office of attorneys' fees based on $70- to $140-per-hour rates charged by attorneys at New York's Cravath, Swaine & Moore.

The Carey opinion reasoned that any award that would generate a windfall for plaintiff's counsel was impermissible under 42 U.S.C. §1988, and proposed a "breakpoint" approach for determining fee awards for nonprofit lawyers. Under this approach, the court would award fees at a rate it believed to be fully compensatory, and then would require the attorneys receiving the award to demonstrate that the hourly rate is not adequate. The court in *Carey* expressly disapproved fee awards that reflect "both a significant profit component and overhead costs significantly higher than those of a non-profit law office".[32]

The Supreme Court has granted certiorari in *Blum v. Stenson*, and is expected to address the conflicting approaches adopted by the 2nd Circuit toward awards of attorneys' fees to publicly funded or nonprofit law offices.

To increase the courts' flexibility in dealing with awards of attorneys' fees for fixed, low-cost legal services, the department's bill would provide guidelines for considering counsel's actual costs in determining the hourly rate. Thus, in cases in which a party is represented by salaried attorneys, such as law firm associates, in-house corporate counsel, or lawyers for a nonprofit organization, the court would be encouraged to consider whether the requested hourly rate unreasonably exceeds the attorneys' salaries, in order to avoid conferring a windfall on the attorneys at the taxpayer's expense. This guideline, which would be permissive rather than mandatory, would encourage courts to award fees that more closely reflect the actual costs incurred by litigants in vindicating their rights,[33] rather than to automatically apply an hourly rate that bestows inappropriate profits on counsel at public expense.

> *Inflated attorneys' fee awards under federal statutes have resulted not only from high hourly rates, but also from judicial application of bonuses and multipliers.*

Inflated attorneys' fee awards under federal statutes have resulted not only from high hourly rates, but also from judicial application of bonuses and multipliers to increase the base fee award. For example, in the Grendel's Den case Tribe requested that his $275 hourly rate be increased by a 50 percent bonus factor to compensate him for the complexity of the case, contingency factors, and delays in receiving payment. Although that request for a 50 percent multiplier has attracted criticism,[34] it pales beside other court-awarded bonuses that have doubled,[35] and even tripled,[36] the amount of the prevailing hourly rate.

This past term, the Supreme Court indicated in *Hensley v. Eckerhart*[37] that a bonus should be available only in exceptional cases. However, courts have allowed bonuses with such frequency that The Washington Post's characterization of the bonus sought in *Grendel's Den* as a "tip"[38] is particularly apt. In the same way in which tips that once were a permissive recognition of excellent service have become mandatory absent egregious conduct, bonuses intended only for "exceptional" attorneys' fee cases have become increasingly routine.

A variety of rationales have been offered for the use of bonuses and multipliers, including novelty and complexity of issues, high quality of representation, contingency factors, and delays in payment. In operation, however, bonuses and multipliers invariably result in the overcompensation of lawyers. The department's bill accordingly would eliminate their use in fee-shifting cases against federal, state, and local governments.

The complexity or novelty of issues in a case, as well as the high quality of representation, should not support an upward adjustment in an otherwise compensatory fee award. To begin with, assuming that the quality of representation is represented by a party's achievement of its litigating objectives, the attorney should receive only a "fully compensatory fee," not a bonus.[39] Even exceptionally good representation should be adequately compensated by the payment to counsel of a reasonable hourly rate for the number of hours expended on a case. Moreover, a lawsuit that involves especially complex or difficult issues should normally involve the expenditure of more billable hours than would a routine case. Accordingly, payment of counsel for all hours reasonably billed on the case should fully reflect its special complexity.

[1] *See, e.g.*, Rajender v. University of Minnesota, 546 F. Supp. 158 (D. Minn. 1982) ($2 million in attorneys' fees at rates of up to $375 per hour); Greater Los Angeles Council on Deafness v. KCET, No. 78-4751R (C.D. Cal. Feb. 11, 1982) ($432,285 in attorneys' fees at rates of more than $300 per hour); Ramos v. Lamm, 539 F. Supp. 730 (D. Colo. 1982), *remanded*, 713 F.2d 546 (10th Cir. 1983) ($710,000 in attorneys' fees at rates of up to $125 per hour); Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982) ($379,375 in attorneys' fees at rates of $125 per hour).

[2] *See* New York Times, Dec. 14, 1983, at A22, col. 1.

[3] Larkin v. Grendel's Den Inc., ___ U.S. ___, 102 S. Ct. 515 (1982).

[4] New York Times, Dec. 14, 1983, at A22, col. 1.

[5] 42 U.S.C. §1988.

[6] Washington Post, Dec. 16, 1983, at A22, col. 1.

[7] Indeed, perhaps in response to the considerable public outcry over his fee request, Tribe now has lowered his request to $150,000. Time, Jan. 23, 1984, at 34.

[8] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). For a general discussion of the American Rule and how it evolved, *see* McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 Minn. L. Rev. 619 (1931); Goodhart, "Costs," 38 Yale L.J. 849 (1929).

[9] *See* 6 Att'y Fee Awards Rep. 2 (October 1983).

[10] 18 U.S.C. § 3006A(d)(1),(2).

[11] Mass. Sup. R. Crim. P. 8.

[12] The recently-enacted Equal Access to Justice Act, 28 U.S.C. §§2412(b), (d); 5 U.S.C. § 504(a)(1), established a $75-per-hour cap for attorneys' fee awards in suits against the United States under the act.

[13] *E.g.*, 42 U.S.C. §1988.

[14] *See* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 716 (5th Cir. 1974). Congress favorably cited this case in the legislative history to the Civil Rights Attorneys' Fees Awards Act of 1976. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted* in 1976 U.S. Code Cong. and Ad. News 5913.

[15] S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5913.

[16] Washington Post, Dec. 16, 1983, at A22, col. 1.

[17] *E.g.*, Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973).

[18] *E.g.*, Bardo v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972).

[19] Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc), is the seminal authority for basing court-awarded attorneys' fees on prevailing corporate firm rates.

[20] 641 F.2d at 912 (Wilkey, J., dissenting) ("Government legal counsel, whether on the plaintiff or defendant side, traditionally simply have never been compensated at the same scale as in private practice").

[21] *E.g.*, Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983).

[22] *E.g.*, Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983) (en banc).

[23] Johnson v. Georgia Highway Express, 488 F.2d at 719.

[24] *See* Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980) (Attorney fee statute does not "create a . . . fee bank to be liberally drawn upon by lawyers for their own welfare . . .").

[25] Washington Post, Dec. 31, 1983, at A9, col. 1.

[26] *See* Washington Post, Sept. 20, 1983, at B2, col. 1.

[27] *See* Nat'l L. J., Sept. 26, 1983, at 10, col. 1.

[28] New York State Ass'n. for Retarded Children v. Carey, 711 F.2d 1136, 1150 (2d Cir. 1983).

[29] 711 F.2d 1150.

[30] 671 F.2d 493 (2d Cir. 1982), *aff'g mem.* 512 F. Supp. 680 (S.D.N.Y. 1981), *cert. granted*, ___ U.S. ___, 103 S. Ct. 2426 (1983).

[31] 711 F.2d 1136 (2d Cir. 1983).

[32] 711 F.2d 1150.

[33] A letter to the Washington Post urged that the attorneys' fee should "restore to a private litigant the money it forces him or her to spend to vindicate constitutional rights." Washington Post, Dec. 31, 1983, at A9, col. 1. Yet this view fails to take into account the fact that attorneys' fee awards often have no relationship to the fees a party undertakes to pay, such as the $100-plus hourly rates awarded to the legal services organization in Blum v. Stenson.

[34] *See* Washington Post, Dec. 16, 1983, at A22, col. 1.

[35] *E.g.*, Laffey v. Northwest Airlines, 572 F. Supp. 354.

[36] *E.g.*, Rajender v. University of Minnesota, 546 F. Supp. 158.

[37] ___ U.S. ___, 103 S. Ct. 1933, 1940 (1983).

[38] Washington Post, Dec. 16, 1983, at A22, col. 1.

[39] *See* Hensley v. Eckerhart, 103 S. Ct. 1940 ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee").

[40] *See* Ruckelshaus v. Sierra Club, ___ U.S. ___, 103 S. Ct. 3274 (1983).

[41] *See* Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983) ("Generally, no prejudgment interest should be paid for the period before the fees are awarded").

[42] *See, e.g.*, 28 U.S.C. §1961; F. R. Civ. P. 37.

[43] 711 F.2d 1154.

[44] *E.g.*, 42 U.S.C. §1988.

[45] *E.g.*, 5 U.S.C. §552(a)(4) (Freedom of Information Act).

[46] *E.g.*, 42 U.S.C. §7604(f) (Clean Air Act).

[47] *E.g.*, 15 U.S.C. §2059(e)(4) (Consumer Product Safety Act).

[48] ___ U.S. ___, 103 S. Ct. 3274 (1983).

[49] ___ U.S. ___, 103 S. Ct. 1933 (1983).

[50] However, where a claim is based on, and decided in accordance with, a statute that does not authorize attorneys' fees, the fact that a party also asserted related claims under a fee-shifting statute will not support an award of attorneys' fees. *See* Smith v. Cumberland School District, 703 F.2d 4 (1st Cir. 1983), *cert. granted sub nom.* Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 334 (1983).

[51] The Equal Access to Justice Act, in addition to imposing a specific cap on attorneys' fees, spells out guidelines on, among other things, when fee awards will lie, when fee petitions must be filed, and how fee requests are to be documented.

[52] *See* White v. New Hampshire Department of Employment Security, 455 U.S. 445, 450 n. 9 (1982).

[53] As noted, in Grendel's Den, Tribe characterized as a "stupid waste of time" the state's requirement that he offer detailed time records to support his $332,441 fee request. In Ramos v. Lamm, 539 F. Supp. at 744, the court, in making an award of $710,000 in attorneys' fees, observed that while production of contemporaneous time records is "the preferred approach" for documenting a fee petition, contemporaneous time records are not required. *See also* New York State Ass'n for Retarded Children v. Carey, 711 F.2d at 1147.

[54] In Laffey v. Northwest Airlines, 572 F. Supp. at 384, the court complained of ". . . attorneys who, in their fervor to produce a thorough fee application have buried this Court with an avalanche of documentation."

[55] It bears noting that the United States Attorney's office for the District of Columbia currently will stipulate to a $75 per hour billing rate in most attorneys' fee cases, but will challenge fee awards based on a higher rate. By eliminating the possibility of higher rates, the bill would put an end to most disputes over the appropriate hourly rate, and would facilitate agreement on the overall fee award.

[56] Hensley v. Eckerhart, 103 S. Ct. at 1950 (Brennan, J., dissenting). ■

MEMORANDUM - Attorney's Fees Award Under §1988

In Akron Center for Reproductive Health v. City of Akron, U.S., 103 S.Ct. 2481, a substantial portion of an Akron ordinance regulating abortions was struck down as unconstitutionality restricting the right of pregnant females to procure an abortion. Defendant--interventors had entered the case and were aligned by the district court on the side of the city defendant. Intervenors argued that their procedural and substantive due process rights would be violated if plaintiffs prevailed in their efforts to strike various portions of the statute. Plaintiffs prevailed on 50% of the claim relevant to the intervenors, whose role in the case was strictly limited by the district court judge. Plaintiffs now seek an award of attorney's fees, under 42 U.S.C. §1988, from both the city defendant and defendant-intervenors. Intervenors argue that they are not liable for fees under §1988, but the district court has entered a non-final order holding intervenors liable.

The Award of Fees Under 42 U.S.C. §1988

42 U.S.C. §1988 provides, in relevant part, that "[t]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs." This was a major depature from the long-standing American rule that each party in a law suit is to bear his own costs. §1988 was designed specifically to allow good faith litigation of civil rights claims by private parties acting as private attorneys' general, who might not otherwise bring an action for fear of losing and being subject to high attorneys' fees. The legislative history of 42 U.S.C. §1988 states that "a party seeking to enforce the rights protected by the statute covered by § [1988], if successful, should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust.... Such a party, if unsuccessful, could be awarded his opponent's fee only where it is shown that his suit was frivolous, vexatious, or brought for harassment purposes." 1976 U.S. Code Cong. and Admin. News at 5912.

This language indicates that the statute is inteneded to insolate those who bring good faith claims, and that an award against an intervening party would be contingent upon the nature of his claim rather than on which side of the case he was aligned or whether or not that side prevailed. Thus, the procedural posture of the case would appear to be irrelevant when the non-prevailing party is asserting his own good faith claim.

The Nature Of The Rights Intervenors Sought To Protect

Intervenors were allowed to enter the suit solely in their individual capacity as parents of unmarried minor daughters of child-bearing age. In this capacity, they sought to protect their procedural due process rights of notice and an opportunity to be heard with respect to decisions affecting their own or their children's interests. These rights are of constitutional dimension and are protected by both the Fourteenth Amendment and the Ohio Constitution. The relevant portion of the Akron abortion ordinance which intervenors were actively allowed to defend (Section 1870-05) involved these specifically protected rights. Intervenors claimed that if plaintiffs were successful in striking this portion of the ordinance, their constitutional rights would be violated in much the same way as plaintiffs claimed theirs' were being violated by the ordinance. Thus, the only way intervenors could protect their rights in this case was by entering the suit and defending Section 1870.05 from plaintiffs' attack.

This, in a sense, put the intervenors in the role of plaintiffs in a civil rights case, because they were not defending themselves in the manner contemplated by §1988, but instead were asserting their own rights which they claimed would be violated if plaintiffs prevailed. This situation appears to be precisely that envisoned by Congress when it protected good faith litigants from bearing the opponents' attorneys fees in an unsuccessful claim.

Conclusion

1) In holding intervenors liable for attorneys fees by the order of June 18, 1984, Judge Dowd has apparently ignored the legislative intent, history and public policy surrounding §1988, as well as persuasive authority in other jurisdictions, all of which take the view that when an intervenor asserts his own rights in a civil rights case, the procedural posture of the case is irrelevant with respect to who wins or loses. What is important is the nature of the claim and whether or not it was brought in good faith. A consistent policy of holding intervenors liable in cases such as this would be precisely the effect which Congress intended to avoid.

2) It is also relevant to note that the total of the fees requested is about $680,000.00, calculated at an approximate rate of $175/hr. This is a substantial sum for a city reeling from unemployment and shrinking tax base, especially where the parties who will profit (the clinics) could afford to pay their own fees.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al

Plaintiffs

-vs-

CITY OF AKRON, et al

Defendants

CIVIL ACTION C78-155A

JUDGE CONTIE

RENEWAL OF MOTION FOR AWARD OF ATTORNEYS' FEES

Pursuant to the previous Order of this Court plaintiffs hereby renew their motion for an award of attorneys' fees against the defendants and defendant-intervenors in the above-entitled action, said award to be made payable to the American Civil Liberties Union of Ohio Foundation, Inc. Plaintiffs hereby respectfully request an oral hearing on or before August 26, 1983,* should this Court deem additional information necessary or appropriate with respect to the reasonableness of the fees sought.

A supplementary memorandum of law and supplementary affidavits detailing fees and expenses incurred since November of 1979 will be submitted to this Court forthwith.

Respectfully submitted,

STEPHAN LANDSMAN
Attorney for the Plaintiffs
Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio 44115
(216) 687-2328

*Counsel for plaintiffs requests a hearing on or before the designated date because of professional commitments that will render him unavailable for a substantial period of time thereafter as will be more fully set forth on counsel's supplementary affidavit.

DOWD, J.

JUL 20 [illegible]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Akron Center for Reproductive Health, Inc., et al.,
Plaintiff,
vs.
City of Akron, et al.,
Defendant.

CASE NO. C78-155A

ORDER

Before the Court is the renewal of the plaintiffs' motion for award of attorneys' fees filed July 15, 1983. The motion states in part that a supplementary memorandum of law and supplementary affidavits detailing fees and expenses incurred since November of 1979 will be submitted to this Court forthwith.

Upon consideration, the Court hereby makes the following orders:

1. The plaintiffs are granted leave to file on or before August 5, 1983, their supplementary memorandum of law and supplementary affidavits.

2. The defendants are granted leave to respond on or before August 15, 1983, to the plaintiffs' motion, memorandum, and affidavits.

3. An oral hearing on the motion is scheduled for August 22, 1983, at 4:00 p.m.

IT IS SO ORDERED.

David D. Dowd, Jr.
U. S. District Judge

CITY OF AKRON

(Fifth Draft of Fees Brief)

Intervenors respectfully urge the court to reconsider its ruling concerning liability for attorneys' fees on three grounds: First, the general intent, legislative history and public policy surrounding 42 U.S.C. § 1988, make it clear that the procedural posture of a case is irrelevant when the party against whom fees are sought is asserting an affirmative constitutional claim. Second, language in Judge Contie's opinion in *Akron Center For Reproductive Health v. City of Akron*, 479 F. Supp. 1172 (1979), and its reliance on Chapter 2151 of the Ohio Revised Code to decide the claims, shows that the interests of the intervenors were personal rights of constitutional stature, and that until this court's ruling the City of Akron was constitutionally required to respect and protect them. Third, special circumstances do exist in this case which make an award of attorneys' fees unjust, and, arguably, unconstitutional. These contentions, and the parts of the court's opinion of June 18, 1984 to which they correspond will be addressed in turn below.

I. The PROCEDURAL POSTURE OF INTERVENORS AS "DEFENDANTS IS IRRELEVANT UNDER 42 U.S.C. § 1988.

The legislative history of 42 U.S.C. § 1988 states that "[a] party seeking to enforce the rights protected by the statutes covered by §[1988], if successful, 'should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust....' Such a party, if unsuccessful, could be awarded his opponents' fee only where it is shown that his suit was *clearly* frivolous, vexatious, or brought for harassment purposes." 1976 U.S. Code Cong. and Admin. News at 5912. (emphasis added) The policy behind this statute is to promote good faith litigation of civil rights claims by private parties acting as private attorneys' general. In the case at bar there were *two* sets of private parties who sought to vindicate claims protected by the civil rights laws: plaintiffs *and* intervenors.

Intervenors have claimed at all stages of this litigation that they were attempting to protect their statutory and constitutional rights from infringement by state and federal action. The rights claimed--procedural due process rights of parents and guardians of unmarried daughters of child-bearing age to notice and an opportunity to be heard before any state action which could adversely affect their own or their children's interests -- are of constitutional dimension, and are protected by both the Fourteenth Amendment and the Ohio Constitution. Their participation in this case was strictly limited by Judge Contie to issues clearly germaine to their interests in these rights. Their remaining participation was solely as _amici_. The _only_ way to protect the statutory and constitutional rights they asserted was to enter the suit, and to assert that plaintiffs' attempts to gain a federal judicial decree which would effectively eliminate their right to notice under Ohio and federal constitutional law would violate _their_ rights. Notably the Supreme Court's opinion makes it clear that intervenors' claims were far from frivolous, and required a [illegible] measure of the Court's attention. See 103 S. Ct. at 2497-99 & N.N. [illegible]-32; 76 L. Ed. 2d at 709-710 & N.N. 29-32. (extensive discussion of parental rights to notice in all cases under Ohio law and indicating that the Court was making a special rule for abortion inapplicable to any other medical judgments made by the Ohio Juvenile Courts).

To tax fees against a litigant who attempts in good faith to assert a constitutionally protected right and loses, is contrary to the express intent of 42 U.S.C. § 1988. More importantly, it chills the right to be heard concerning the outcome of constitutional litigation which seeks to eliminate the rights claimed and places a "condition" on due process not imposed on plaintiffs. _See Wolfe v. Stumbo_, No. C 80-0285 L (A) filed December 15, 1983. (W.D. Kentucky) (refusing to hold intervenors liable).

Thus, the legislative history makes it clear that the procedural posture is irrelevant when an intervenor asserts a good faith personal constitutional claim; for he or she stands in exactly the same position as a plaintiff asserting a constitutional claim. The only difference is that the rights must be asserted against plaintiffs, the state, and the federal judicial power in order to protect unique personal interests. A policy of ignoring the procedural posture and focusing instead on the character of the interests asserted prevents both "races to the courthouse," and situations like this case where the plaintiffs' assertion of a constitutional right to bypass parents altogether was inherently inconsistent with existing parental statutory and constitutional rights. It is unfair and inconsistent with Congressional intent to judge a private plaintiff by one standard should the defendant prevail, and not give the same benefit of the doubt to other private parties who claim their rights will be lost if plaintiff prevails. The legislative history makes it clear that Congress did not intend such a result, and this court should not sanction it.

When Judge Contie restricted the intervention to defense of their interests as parents of minor children of childbearing age, he implicitly recognized that where public policy litigation such as this case is involved, it is likely that recognition of one set of private rights will *pro tanto*, modify others. This is what happened here. Intervenors did not act "in concert" with the city to violate plaintiffs rights, nor did they "voluntarily" align themselves as defendants with the understanding that they would be subjecting themselves to liability under 42 U.S.C. §§ 1983 and 1988. Rather, they attempted to litigate a claim of personal constitutional rights as *parents and guardians* which are distinct from any interest which could be claimed by the City. The rights they claim have been held, in other contexts, to be protected against state action by 42 U.S.C. § 1983! *See* (*Santosky v. Kramer*, 455 U.S. 745 (1982); *Wisconsin v. Yoder*. 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). Such parental claims are hardly frivolous, and Congress intended Section 1988 to encourage them. The orders in this case do just the opposite.

An analogous situation would be an attempt by the plaintiff to quiet title to a piece of disputed property. If a third party finds out about the attempt and then goes to court to defend that interest in the property, he is "aligned" with the defendant only to the extent that both are in a "defensive" position vis-a-vis the plaintiffs. But the interests of intervenors and defendants are not the same, and, as they were here, may well be adverse to some degree. Likewise, plaintiffs' rights could not be fully recognized by this court without effectively cutting off intervenors' statutory and constitutional right to notice and an opportunity to be heard in proceedings affecting the welfare of their daughters. Had the City *enacted* the rule laid down by the Supreme Court in *Akron Center*, intervenors could--and probably would--have filed a Section 1983 action against the enactmentment. Their claims would have been identical to those raised here. Had they lost, there would be no authority to tax fees against them unless the claims were frivolous or in bad faith.

Although the Court relies on *Haycraft v. Hollenbach*, 606 F. 2d 128 (6th Cir. 1979) as authority for its position that the status of an intervenor alone does not insulate one from attorneys' fees liability, it does not support the proposition that private litigators raising their *own* constitutional rights are liable. Intervenors have never claimed that no intervenor can be taxed fees; only that intervenors raising constitutional claims or defenses must be judged by the same standard as an unsuccessful plaintiff. Courts which have addressed this issue have held in favor of non-liability. *See, e.g.*, *Wolf v. Stumbo*, *supra*; *Planned Parenthood of Memphis v. Alexander*, No. 78-2310 (W.D. Tenn., filed December 12, 1981); *Kirkland v. New York State Department of Correctional Services*, 524 F. Supp. 1214 (S.D.N.Y. 1981).

The intervenor in *Haycraft* was not a private party; he was a county judge *acting in his official capacity* when he submitted an alternative desegregation plan for the county school system. He was, in fact, a *state* actor whose conduct was subject to Section 1983 limitations. In addition, the intervention by the judge was characterized as being "in bad faith," and reflecting acts of "obdurate obstinacy." In the case before this court there is no nexus between intervenors and the City: they are private parties whose conduct is *protected* by Section 1983. Neither is there any hint of bad faith. *Haycraft*, therefore, does not compel the court's conclusion.

II. THE RELIANCE OF BOTH JUDGE CONTIE'S AND THE SUPREME COURT ON CHAPTER 2151 OF THE OHIO REVISED CODE DEMONSTRATES THAT PLAINTIFFS' COULD NOT HAVE PREVAILED WITHOUT MODIFICATION OR ELIMINATION OF INTERVENORS' CONSTITUTIONALLY PROTECTED INTERESTS

Both Judge Contie and the Supreme Court relied on Chapter 2151 of the Ohio Revised Code in striking down Section 1870.05 as unconstitutionally requiring "parental notice in all cases." 479 F. Supp. 1202; 103 S. Ct. at 2497-99 & N.N. 29-32; 76 L. Ed. 2d at 709-710 & N.N. 29-32. Because Chapter 2151 of the Ohio Revised Code "provides for notice in all instances *once [a] complaint has been filed*...", both courts held that the sections of the ordinance which reflected intervenors' notice rights was unconstitutional. By doing so, they created a constitutional privilege for abortion clinics to abort unmarried, immature minors without seeking the prior judicial approval which would be required in any other non-emergency case. The fact that Chapter 2151 merely tracks procedural due process requirements designed to afford parents a right to be heard before the state authorizes treatment of their children was simply ignored or "set aside" because of the alleged importance of the abortion right.

Whether this decision is correct or not as a matter of policy is not the issue here, however. Rather, it is that two sets of constitutional rights have come into conflict in a case which is best described as "public policy" litigation. To reward the plaintiffs at intervenors' expense not only penalizes and chills their right to be heard in defense of their personal rights , but it also casts substantial doubt on the existence of long-recognized parental substantive and procedural due process rights. See Santosky v. Kramer supra; Wisconsin v. Yoder supra; Pierce v. Society of Sisters supra.

III. SPECIAL CIRCUMSTANCES EXIST WHICH WOULD MAKE AN AWARD OF ATTORNEYS' FEES AGAINST FROM INTERVENORS UNJUST.

A. Assertion of a Good-Faith Constitutional Claim is a "Special Circumstance"

In this case Judge Contie allowed intervenors limited participation in the case because he determined they had personal rights to litigate. Indeed, he expressly noted the importance of the parental interests involved in this case. 479 F. Supp. at 1202

> ("Such consultation requirement furthers the state's interest in insuring that parents be given an opportunity to participate in an important and potentially traumatic decision in the life of their minor daughter . . . .
>
> This Court recognizes that for the vast majority of minors parental consultation concerning such an important and irreversible decision is not only desirable, but essential." 479 F. Supp. 1172, 1202.)

This sets it apart from the cases cited by the court in support of its ruling. Vulcan Society of Westchester County v. Fire Department, 533 F. Supp. 1054 (S.D. N.Y. 1982), for example, is distinguishable on the grounds that the intervenor in Vulcan was a firefighter's union whose actions in the case were explicitly found by the court as not undertaken to protect the constitutional rights of its members. Id. at 1062. The union was also a party to the consent decree in question and was actively involved with the defendant Fire Department in illegal attempts to frustrate the interests of the plaintiffs. There is neither allegation, nor proof of such conduct here. Only the good faith assertion of constitutional and statutory rights.

By contrast, Kirkland v. New York State Department of Correctional Services, 524 F. Supp. 1214 (S.D. N.Y. 1981), involved intervenors who were white employees challenging the legality of affirmative action remedies designed to alleviate the effects of a discriminatory civil service examination. The intervenors claimed the remedy selected would unconstitutionally discriminate against them in favor of black and Hispanic plaintiffs. The court refused to levy attorney's fees against the unsuccessful intervenors because "the Congresssional intent that civil rights litigants not be deterred from asserting their good faith constitutional claim by the risk of liability for attorneys' fees outweighs the general policy of encouraging civil rights plaintiffs by awarding them attorneys' fees when they prevail." Id. at 1218 (emphasis added).

The circumstances of the intervention in Kirkland are very similar to those of the instant case. Intervenors in both cases sought protection of constitutional rights which they contended would be violated if plaintiffs' prevailed, rights independent of the state and city defendants. The court here rejects Kirkland in favor of Haycraft, but Haycraft is not the same kind of case at all given Section 1988's policy to encourage full litigation of these claims. The intervenor in Haycraft was acting in his official capacity as a county judge, thus creating a nexus between himself and the defendant Board of Education. Second, the 6th Circuit relied on a finding that "appellant's intervention amounted to obstinacy in resisting appelees' realization of their clearly defined legal rights." 606 F. 2d at 133 (emphasis added). In light of these important distinctions, intervenors submit that the court should reconsider its reliance on Haycraft and adopt the good faith standard set out in Kirkland.

B. Intervenors Performed a Beneficial Service by Framing the Issue Before the Court and this Constitutes Special Circumstances Justifying the Denial of an Award of Attorneys' Fees Against Them.

Judge Contie would not have allowed intervenors in the case at all had he thought their limited role was unnecessary. Although this court relies on May v. Cooperman, 578 F. Supp. 1308 (D.N.J. 1984), in rejecting the claim of "special circumstances," it--like Vulcan and Haycraft-- is distinguishable. In Cooperman the executive branch of the state government "refused to defend the lawsuit because of a good faith belief that the statute [in question] was unconstitutional; [and] the legislature chose to intervene and litigate vigorously because of a strong interest it took in the statute." Thus, both defendants and defendant-intervenors in Cooperman were official representatives of the State of New Jersey. Both could be liable for an award of attorneys' fees in any action filed directly against them which was based on Section 1983. In this case, however, defendant-intervenors are private parties who could not be held liable under Section 1983 unless it were shown that they acted in concert with the City to deprive plaintiffs of their rights. Other than raising their own constitutional rights as a claim, intervenors have not participated in any "state action" whatever.

> More importantly, the District Court in Cooperman noted that: "[t]he result [without recovery against the legislature] was that plaintiffs [have been] put to extensive and costly litigation, but are unable to recover fees from the party from whom they would normally recover fees under §1988. Were they also unable to recover from the defendent-intervenor, I believe the intent of the fee statute would be thwarted." Id. at 1317-18. (emphasis added)

In other words, plaintiffs, as prevailing parties in Cooperman, had a right to recover against the State of New Jersey, but the party from which fees would normally come, the executive branch, did not defend. Fees were then awarded against the state agency which did defend: the Legislature. Cooperman, therefore, does not support this Court's ruling regarding private parties.

C. An Award of Fees Against Intervenors Will Have a "Chilling Effect" on the Right of Third Parties to Raise and Defend Constitutional Rights.

Although the legislative history of §1988 shows that this is precisely the effect intended to be avoided by the statute, and Planned Parenthood of Memphis v. Alexander, no. 78-2310 (W.D. Tenn. Dec. 24, 1981) accepted this position, this court declares that intervenors could have expressed their concerns by appearing as amicus. But intervenors respectfully submit that such a limited view of the right to be heard respecting constitituional rights finds no support in either Rule 24 or the cases. An amicus by definition, has no standing in the case at bench to raise a "case or controversy" subject to the judicial power of Article III, and has no right to be heard. The interest of an amicus is only an academic or ancillary interest in the outcome of the case. In the case at bar, the threatened injury to intervenors was palpable and direct: plaintiffs sought a judicial decree to modify intervenors' existing rights, and claimed the constitutional right to evade them altogether. This gave intervenors standing under Article III to protect their interests under both the Constitution and Ohio law. *See Allen v. Wright*,-U.S.-, 52 U.S.U.W. 5110, 5117 (June 26, 1984); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing can be based on statutory rights). To hold that their interests rise only to the level of *amicus* participation is inconsistent with the existence of the rights affected by this litigation.

The testimony in the record concerning the treatment of minors bears witness to the inevitable clash of the asserted rights of plaintiffs and intervenors. Intervenors played a positive role in this action by actively defending their interests. It was a role directly related to their rights as parents, and clearly framed the issue for decision. Only by intervening would intervenors have had the opportunity to rebut the evidence and cross-examine witnesses. From the perspective of an interested party whose rights are at stake, such actions are not takenm to be vexatious or time-consuming for plaintiffs: it is their right, protected by the Fifth Amendment to the Constitution itself, to do so. Because this court is justifiably concerned about the "chilling effect" that fee awards would have on bona fide civil rights claims, we ask the court to reconsider.

Conclusion

In conclusion, we respectfully ask the court to reconsider its position and to the legislative intent, history, and public policies involved when intervention in a civil rights case is based on claims of personal rights by a private party. In addition, we ask the court reconsider the "special circumstances" involved in this case which cautions against an award against intervenors. Finally, the court should consider the injustice of a fee award against intervenors, and the chilling effect it will have on the ability of private parties to seek redress or consideration in this type of public policy litigation. To do less would be to condition the constitutional right to be heard in civil rights ligigation, and to create a judicial preference among parties who are similarly situated in the eyes of the law. This, Congress did not intend, and, we submit, this court should not allow.

Respectfully submitted

By ______________________

FILED
[illegible] 2:49

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Akron Center For Reproductive Health, et al.,	)	
Plaintiffs,	)	CASE NO. C78-155A
vs.	)	
City of Akron,	)	O R D E R
Defendant.	)	

The Court has before it the motion of plaintiffs' counsel for an award of attorney's fees following plaintiffs' successful prosecution of this §1983 action.

Plaintiffs' counsel first sought an award of attorneys' fees in October, 1979. By an order dated February 22, 1980, Judge Contie deferred decision on that fee application pending the resolution of the appeal of the case on the merits. The Supreme Court affirmed the judgment on the merits in favor of the plaintiffs on June 15, 1983. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481 (1983).

Following the Supreme Court's decision, plaintiffs renewed their application for attorneys' fees on July 15, 1983. The Court conducted an evidentiary hearing on the application on August 22, 1983.[1]

---

[1] The hearing was conducted on an expedited basis at (footnote continued)

Upon review of the arguments and briefs of counsel, the Court finds that the issues raised fall into three broad categories. Initially, the parties seek a determination of whether plaintiffs' counsel shall receive any award of fees. If the Court determines that a fee award is appropriate, the parties raise a number of issues surrounding the legal standards which the Court will apply in determining the reasonableness of the fee application. Finally, once these legal issues are resolved, the parties raise factual challenges to the reasonableness of the fee applications. This opinion will focus on the first category of issues - whether a fee award is appropriate in this case.

I.

Plaintiffs' claim for attorneys' fee in this case is governed by the Civil Rights Attorneys Fees Act, 42 U.S.C. §1988. In relevant part, that statute provides that:

> The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

Id. Under the terms of this statute, the appropriateness of an attorneys' fee award is left to the discretion of the trial court. While the award of attorneys' fees is discretionary, Congress and the appellate courts have provided significant guidance on the standards which a

---

1. (Footnote continued)
the request of Stephan Landsman, chief counsel for the plaintiffs, in view of the impending departure of Mr. Landsman to begin a one-year appointment as a visiting professor of law in England. The parties have filed a series of briefs relating to the fee application since the hearing.

trial court should use in exercising its discretion on this issue.

As noted by one recent trial court, the legislative history and judicial interpretation of the statute demonstrate that the Court's discretion to deny fees is narrow. The Senate report states:

> . . . A party seeking to enforce the rights protected by the statute's covered by [§1988], if successful, "should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust."

1976 U.S. Code Cong. and Ad. News at 5912. The report cited the Supreme Court decision in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) with approval as stating the standard for "special circumstances." Since enactment of the statute, the Supreme Court has once again affirmed the "special circumstances" standard. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). In that case, the Court stated that:

> The court's discretion to deny a fee award to a prevailing plaintiff is narrow. Absent "special circumstances", . . . fees should be awarded.

Id. at 68. (citations omitted). In view of this standard, the Court must find "special circumstances" to justify a denial of an attorney fee award.

II.

Both the city-defendants[2] and the

---

[2] The city-defendants include the City of Akron, Mayor John S. Ballard, Director of Public Health, Dr. C. William Keck, and Police Prosecutor Peter Oldham. As Ballard, Keck, and Oldham have been sued in both their
(Footnote continued)

intervenor-defendants[3] have raised legal arguments that special circumstances render an award of attorneys' fees inappropriate in this case. The city-defendants argue that the arrangement between plaintiffs, Mr. Landsman, and Cleveland State University (CSU) - Mr. Landsman's employer - violates state law. The City, therefore, contends that special circumstances preclude an award of attorneys' fees in this case because this arrangement violates public policy. Even if the Court rejects this argument and makes an award of attorneys' fees, the intervenor-defendants argue that their status as intervenors constitutes special circumstances, and that they should not be held responsible for the fee award.

A.

The city-defendants first argue that plaintiff's representation arrangement violates the state constitutional prohibition of the use of public funds for private purposes. In relevant part, Ohio's constitution provides that

> The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever. . . .

Ohio Constitution, Article VIII, §4. In the City's view, the plaintiffs, which include private corporations, have not paid for their representation in this action, and therefore,

---

2. (Footnote continued)
individual and official capacities, their successors have been automatically substituted as defendants in their official capacities pursuant to Fed. R. Civ. P. 25(d).

[3] The intervenor-defendants are Dr. Francois Seguin and Ms. Patricia K. Black.

have received "credit" from CSU and the State of Ohio. The city-defendants have not provided any case authority in which an Ohio state court has found such a relationship to violate the state constitution. In the absence of such authority, and in view of the Court's finding that the alleged misuse of state funds is, at best, attenuated, the Court will not conclude that the fee arrangement in this case violates the state constitution.

The city-defendants also argue that Mr. Landsman's participation in this action violated the CSU by-laws regulating extramural employment by professors. Under the CSU by-laws, certain procedural steps must be taken before a professor may provide his services or use university materials for extramural employment. Mr. Landsman's involvement in this case, however, was related to his duties in the law school's clinical program. While the city-defendants have presented a substantial argument that Mr. Landsman may have crossed the line between his participation in this matter as part of his clinical duties and participation as extramural employment, the Court believes that consideration of this matter is best left for the judgment of CSU and state auditing officials. The Court, therefore, will not declare that Mr. Landsman's activities violated the CSU by-laws.

Under these circumstances, the Court does not find a violation of either the state constitution or the university by-laws in Mr. Landsman's participation in this action. The

Court, therefore, does not find that the arrangement between the ACLU, CSU, and Mr. Landsman is violative of public policy. Accordingly, the Court does not find that the representation arrangement constitutes "special circumstances" justifying a denial of attorneys' fees.

B.

Consideration of the intervenor-defendants' argument that they should not be required to contribute to an attorneys' fees award must begin with an analysis of their participation in the underlying law suit giving rise to this fee dispute. On April 26, 1978, seven days after the filing of the complaint in this action, intervenor-defendants filed their petition to intervene in this action. In their petition, intervenor-defendants sought leave to represent a number of groups of allegedly interested parties.[4] Plaintiffs opposed the motion. Judge Contie ultimately granted the motion in part and denied the motion in part in an order filed on May 16, 1978. In that order, Judge Contie allowed the intervenor-defendants to intervene "solely in their individual capacity as parents of unmarried minor daughters of child- bearing age." Order at 2. Judge Contie went on to limit intervenor-defendants' participation in this action "to the issues directly effecting the scope of their intervention. By way of example, participation at trial, either by way of direct evidence or cross-examination, shall be limited solely to their claims as parents of unmarried minor daughters of child-bearing age." Id. With regard to any other issues, intervenor-defendants' participation was limited to submission of amicus curiae briefs.

---

[4] Dr. Seguin sought leave to intervene on the following basis:

(Footnote continued)

Despite this limited scope of intervention, intervenor-defendants litigated their claims vigorously. They filed nearly 40 documents in the case, including at least 14 to which plaintiffs had to independently respond. Intervenor-defendants took an active role at trial, occasionally requiring the Court to stop their inquiry into areas beyond the permitted scope of intervention. On appeal, intervenor-defendants challenged the district court decision, and fully

---

4. (Footnote continued)

> (a) As guardian ad litem for unborn children, pre-viable and viable, whose lives, health, rights, and interests are protected through Akron Ordinance No. 160-1978.
>
> (b) As guardian ad litem for infants born alive as the result of legal abortion whose lives, health, rights, and interests are protected through Akron Ordinance No. 160-1978.

Dr. Seguin and Ms. Black together sought leave to intervene on the following basis:

> (a) On behalf of themselves, each of whom as parents of minor daughters of child-bearing age, who are not now married and have never been married, and whose rights as parents are protected by Akron Ordinance No. 160-1978.
>
> (b) On behalf of the class of parents of minor daughters of child-bearing age who are not now married and have never been married, and whose right as parents are protected by Akron Ordinance No. 160-1978.

Petition to Intervene at 1.

participated in the proceedings at the Court of Appeals. They also unsuccessfully petitioned the United States Supreme Court for a writ of certiorari and filed briefs in the consolidated appeals of the other parties. Counsel for the intervenor-defendants ultimately argued this case before the Supreme Court on behalf of the city-defendants. While the parties dispute the extent to which the plaintiffs ultimately prevailed, it is undisputed that plaintiffs prevailed on at least some of the issues on which intervenor-defendants participated in the lawsuit.

Based on this record, intervenor-defendants argue that the Court should not require them to contribute to an award of attorneys' fees. Intervenor-defendants argue initially that their status as intervenor-defendants, standing alone, constitutes special circumstances justifying denial of the award. Alternatively, intervenor-defendants argue that there are other special circumstances which support a denial of the application in this case.

Intervenor-defendants initially seek a blanket statement that intervenor-defendants are not liable for attorneys' fees in civil rights actions. The Sixth Circuit, however, has previously approved an award of attorneys' fees against an intervenor-defendant in Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979). In that case, the Court awarded attorneys' fees against an intervenor-defendant who advocated an alternative desegregation plan for a local school district. In another unpublished decision, the U.S.

District Court for the Northern District of Illinois reduced a successful plaintiffs' award of attorneys' fees because they failed to name an intervenor-defendant in the application. Wynn v. Scott, No. 75 C 3975 (N.D. Ill. Jan. 11, 1980). None of the cases cited by intervenor-defendants' directly contradict this position.[5]

In this case, the Court is of the view that the intervenors voluntarily chose to align themselves with the city-defendants in opposing the relief sought by the plaintiff in this action. As such, they acted in concert with the city-defendants and contributed to the effort required of the plaintiffs to substantiate their position in Court. Under these circumstances, the Court concludes that the intervenor-defendants' status does not preclude an award of attorneys' fees.

Regardless of this conclusion, intervenor-defendants urge this Court to find special circumstances and to deny an award of attorneys' fees in this case. The issue for determination in this case, therefore, is whether intervenor-defendants have presented appropriate special circumstances to support denial of an award of attorney's fees. Intervenor-defendants have raised four arguments which they urge the Court to accept as special circumstances sufficient to deny an award of attorneys' fees.

---

[5] 5. The cases cited by intervenor-defendants do not support the proposition that an award of attorneys' fees against intervenor-defendants is barred. In Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. Dec. 24, 1981), the district court found that other special circumstances in the case barred an award of attorneys' fees against the intervenor-defendants. In Kirkland v. New York State Department of Correctional Services, 524 F.Supp. 1214 (S.D. N.Y. 1981), the Court relied on other special circumstances to justify a denial of attorneys' fees against intervenor-defendants. In Chance v. Board of Examiners, 70 F.R.D. 334 (S.D. N.Y. 1976), the intervenor-defendants participated as parties in only a very limited portion of the case, serving as amicus curiae for the remainder of the action. In none of these cases, did any of the courts even suggest that an award of attorneys' fees against intervenor-defendants would never be appropriate.

Intervenor-defendants argue that they are not liable for attorneys' fees under §1988 because they took no actions which violated plaintiffs' constitutional rights; the City, the entity which adopted and enforced the ordinance, was the only party in a position to provide the relief sought by plaintiffs.[6] A number of courts have rejected this argument. In Haycraft, the Court rejected this argument characterizing the intervenor-defendants' participation in the lawsuit as presenting a "substantial barrier to the realization of the full constitutional rights of [the plaintiffs.]" Haycraft v. Hollenbach, 606 F.2d 128, 132 (6th Cir. 1979). This position was developed in more depth in Vulcan Society of West Chester County v. Fire Department, 533 F.Supp. 1054, 1062 (S.D. N.Y. 1982). In that case, the Court stated that the intervenors'

> efforts imposed substantial costs upon plaintiffs, and plaintiffs prevailed over the unions' opposition on most of the issues involved. . . . Having chosen to participate as defendants, the unions must be treated as defendants, both to achieve the purposes of the law granting attorneys' fees to prevailing litigants in civil rights litigation, and in order to avoid unfairly

---

[6] In some ways, intervenor-defendants now appear to be arguing that they never were an appropriate party to this lawsuit. Having voluntarily petitioned the Court to intervene in this action, and having fully participated in the action throughout its procedural history, intervenor-defendants cannot now be heard to argue that they were an improper party to the lawsuit.

> imposing upon the other defendants more than their fair share of plaintiffs' fees.

Id. at 1062. In view of these authorities, the Court concludes that the intervenor-defendants' inability to provide the relief sought by the plaintiffs in this action does not constitute special circumstances which would support a denial of an award of attorneys' fees.

Intervenor-defendants have also argued that they should not be held liable for an award of attorneys' fees because their actions were taken in good faith. They argue that the issues raised by this litigation were matters of first impression and that they acted in good faith in urging the adoption of their particular views on those issues. While the Kirkland court accepted the intervenors' good faith as a basis for finding circumstances, 524 F.Supp. at 1217-19, the Sixth Circuit has taken an opposing view. In Haycraft, the Court stated:

> An award of attorneys' fees under §1917[7] is not based on a defendant's intent or purposes, nor does the prevailing party need to demonstrate "bad faith" on the part of his opponent under this section. . . .

606 F.2d at 132. In view of this authority, the Court rejects intervenor-defendants' argument that their good faith represents special circumstances.

Intervenor-defendants next argue that their beneficial service in framing the issue before the Court in the §1983 claim provides the special circumstances justifying the denial of an award of attorneys' fees. This argument was recently considered in May v. Cooperman, 578 F.Supp. 1308 (D.N.J. 1984). In that case, the district court awarded attorneys' fees against a state legislature which had intervened as a defendant in support of the constitutionality of a "minute of silence" statute. In that case, the court stated that while intervenors:

---

[7] Haycraft involved an award of attorneys fees under 20 U.S.C. §1617, a provision dealing with the award of attorneys' fees in school desegregation cases. That statute, and the cases decided under it, are applicable to cases decided under 42 U.S.C. §1988.

> defense of the statute assisted in the development of the facts and law, thereby serving what I considered a valuable public function, the same could be said for the defendants in many §1983 cases. The fee statute contemplates fee assessment against defendants notwithstanding that type of contribution. Having intervened, the Legislature stands in the same position as any other defendant who has defended an unconstitutional statute.

Id. at 1317. The Court finds this reasoning persuasive and, therefore, rejects intervenor-defendants' argument that this argument constitutes special circumstances.

The final argument raised by intervenor-defendants in favor of a finding of special circumstances is the position that liability for an award of attorneys' fees will have a chilling effect on intervenors' efforts to promote constitutional values. In Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. Dec. 24, 1981), Judge Wellford stated that:

> To allow the plaintiffs' claim for very substantial fees and costs in these circumstances against intervenors could well choke or, as a practical matter, even preclude the opportunity of persons and groups legitimately concerned about enforcement of,

> or challenge to, controversial laws relating to important, delicate and sensitive personal rights, to express their positions or become involved before the courts.

Slip. Op. at 8 (citation omitted). Upon review of this decision, the Court will not follow the Alexander court's reasoning. Intervenor-defendants could have expressed their legitimate concerns regarding the constitutionality of the challenged ordinance by appearing as amicus curiae before the Court. Instead, intervenor-defendants elected to become parties to this action and align themselves with the city-defendants. Having done so, intervenor-defendants cannot be heard to argue that they sought only an amicus curiae role in this case. Under this analysis, the Court rejects this proposed claim of exceptional circumstances.[8]

C.

In view of this analysis, the Court concludes that there are no special circumstances justifying the denial of an attorneys' fee award in this case. Accordingly, the Court will make an award of attorneys' fees in this case.

III.

Having concluded that an award of attorneys' fees is appropriate in this case, the Court next turns to a consideration of the second category of issues raised by the fee application - the legal standards which the Court will apply in determining the reasonableness of the fee application. Upon review of the parties' briefs, the Court believes that further briefing is appropriate on the following questions:

---

[8] Another basis for rejecting the Alexander court's analysis is a consideration of the Alexander court's discussion of the intervenor-defendant's "good faith." Despite the Haycraft court's ruling that intent is irrelevant, the Alexander court relied upon the "good faith" of the intervenors in denying an award of attorneys' fees. Slip Op. at 7. The Court, however, recognizes that subsequent appellate rulings on the "chilling effect" argument may require the Court to reexamine its ruling on this issue.

1. Should the Court make an apportionment of liability for attorneys' fees between the city-defendants and the intervenor-defendants?[9]

2. Does the Sixth Circuit's failure to tax costs to the defendants in this action preclude an award of attorneys' fees for work before the Sixth Circuit? See Buian v. Baughard, 687 F.2d 859, 862 (6th Cir. 1982).

3. Is plaintiffs' counsel entitled to an award of attorneys' fees for work before the United States Supreme Court?

4. Is the relevant market for determining hourly rates different for work before District Court, Court of Appeals, and the Supreme Court?

5. If the Court concludes that the relevant community for determining any portion of the prevailing market rates to be used in calculating the award is Akron, does the Court have the authority to call members of the Akron legal community as its own witnesses to testify regarding

---

[9] The Court's research indicates that a number of courts in the Seventh Circuit have addressed this problem. See Decker v. United States Dept. of Labor, 564 F.Supp. 1273, 1281-82 (E.D. Wisc. 1983).

prevailing market rates?

6. Pursuant to the analysis set forth in Hensley v. Eckerhart, 103 S.Ct. 1933 (1983), should this Court exclude any elements of plaintiffs' application for attorneys' fees?

7. How have other courts analyzed the reasonableness applications for attorneys' fees (a) for multiple moot court exercises in preparation for Supreme Court argument? and (b) for the work of multiple consultants who assist in preparing Supreme Court briefs?

8. Under the standards set out in Blum v. Stenson, 104 S. Ct. 1541 (1984), should plaintiffs' counsel receive an upward adjustment from lodestar?

Counsel are to file their briefs discussing these issues on or before July 16, 1984. Upon resolution of these issues, the Court will schedule a second evidentiary hearing regarding the reasonableness of the individual items of the attorneys' fees application.

If counsel desires to conduct any further discovery in this matter, counsel shall file proposed discovery requests with the Court. All discovery, with the exception of a deposition of Mr. Landsman, must be complete by August 1, 1984.

IT IS SO ORDERED.

David D. Dowd, Jr.
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,	)	
	)	CASE NO. C78-155A
Plaintiffs,	)	
-vs-	)	
CITY OF AKRON,	)	
	)	JUDGE DOWD
Defendant.	)	

PLAINTIFFS AKRON CENTER FOR REPRODUCTIVE HEALTH, et al., BRIEF IN RESPONSE TO QUESTIONS POSED IN JUNE 18, 1984 ORDER

I. Preliminary Statement

In Hensley v. Eckerhart, 76 L. Ed.2d 40, 53 (1983), the Court emphasized that "[a] request for attorney's fees should not result in a second major litigation." At bar precisely sucn a result is occurring. Despite the clear and specific mandate of 42 U.S.C. §1988. as construed in Hensley and Blum v. Stenson, 79 L. Ed.2d 891, 895 (1984)(emphasis noted), that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours **reasonably expended** on the litigation times a **reasonable** hourly rate," defendant and defendants/intervenors would have this Court hold plaintiffs' (hereinafter collectively referred to as "Akron Center") request for fees to strict, parsimonious scrutiny.

A reasonableness standard should avoid just the kind of intense litigation over fees defendant and defendants/ intervenors are pursuing here. For example, one of the issues presented is whether the moot courts engaged in by Akron Center's attorneys were appropriate.

Surely, a reasonableness standard demands some deference to the professional opinion of ultimately successful attorneys about the degree of preparedness necessary for a convincing Supreme Court argument. In researching this issue for 1.5 hours on the LEXIS system, not one case dealing in such detail with a fees request that moot courts were mentioned was found. Yet, moot courts are universally done, recommended by experts, see Re, Brief Writing and Oral Argument 187 (4th ed. 1965)("This is an opportunity that no appellate counsel can afford to miss."), and as billable as any other necessary preparation for delivery of professional services.

If fees litigation is ever going to be less onerous, then the reasonableness standard must be utilized to reject a microscopic review of the fees request. Otherwise, nitpicking over how many, if any, moot courts it takes to make a solid presentation will be encouraged.

Importantly, Akron Center is not arguing that their attorneys' fees requests be given a rubber stamp. The Supreme Court has labeled the reasonable hours and rates submission by prevailing plaintiffs' attorneys the "most useful starting point." Hensley, 76 L. Ed.2d at 50. Upward or downward adjustments are appropriate when specifically determined by the trial court. Nonetheless, the strong preference for negotiated fees award, Blum, 79 L. Ed.2d at 904 n.19, can hardly be fueled by declaring open season on every line item in the fees request and substituting a parsimonious standard for a reasonable one.

The purposes of the fees award must ever be kept in focus. First, private attorneys general are to be compensated for enforcing the public interest. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968).

Second, deterrence of unconstitutional conduct is to be accomplished through a fees award. S. Rep. 94-1011, 94th Cong. 2d Sess. 2 (1976). Accord, Hutto v. Finney, 437 U.S. 678, 691-92 (1978). Prior to defendant's adoption, due largely to the urging of defendants/intervenors, of the Ordinance at bar, Akron Center and other interested groups strenuously presented the constitutional objections to the Ordinance. Those objections went so unheeded in part because leaving protection of the unpopular rights of a perceived minority to lawsuits was preferred. Congress intended attorney's fees to serve as a reminder to entities like defendant and defendants/intervenors of their obligation to comply with the Constitution.

In the instant case, defendant and defendants/intervenors set out to invent the model anti-choice statute, restricting access to abortion at every turn. To vindicate the public interest in access, a lawsuit had to be commenced. No damages were to be sought, just injunctive relief.

Against the municipal government and the Right-to-Life organization, for which defendant/intervenors fronted and whose attorney even argued on behalf of defendant in the Supreme Court, private attorneys general had to be secured. Those attorneys were forced to trial on the complex and novel questions concocted by defendant and defendants/intervenors in an attempt to circumvent Roe v. Wade, 410 U.S. 113 (1973). Then, the private attorneys general had to pursue the case to the appellate level and ultimately to the Supreme Court.

In the Supreme Court, not only were defendant and defendants/intervenors trying to salvage what had been lost at the appellate level, but they were also seeking to undermine Roe. In that task they were joined by the Solicitor General, who both submitted a brief and orally argued the proposition that the standard for judicial review of restrictive anti-choice laws should be eased. The best efforts of the United States Government, through the Department of Justice, defendant, and defendants/intervenors notwithstanding, the Supreme Court not only affirmed what Akron Center had won on appeal but also reversed what Akron Center had lost, providing a victory in a case that was justifiably followed on a national level in broadcast and print media and law reviews as the most important abortion litigation since Roe.

In this context, the fees requested at bar are in fact and in law reasonable and should be granted. Rather than replicate all the arguments and authority already before the Court, this brief will complement prior memoranda and authority by specifically presenting only new arguments or support regarding the questions raised in the Court's June 18, 1984 Order.

II. Apportionment of Liability

Now that defendants/intervenors have been found susceptible to an award of attorney's fees, the issue of joint and several liability has been raised. In Decker v. United States Dept. of Labor, 564 F. Supp. 1273, 1281 (E.D. Wisc. 1983), the plaintiffs sought such liability from defendants/intervenors, but the Court determined that an apportionment of the fees' award should be made.

Akron Center makes no claim for joint and several liability; rather, the Decker reasoning should apply: defendants/intervenors should be responsible in terms of the fees awarded for those services performed by Akron Center attorneys that were directly related to defendants/intervenors' conduct. Thus, time spent (1) in trial by defendants/intervenors in questioning witnesses and producing evidence and by Akron Center attorneys in response; (2) on appeal on issues pursued solely by defendants/intervenors; and (3) on procedural matters relating to the efforts of defendants/intervenors will be sought. From a review of the transcript of the trial and subsequent proceedings, the docket sheets, and the work product in this case, such an apportionment can accurately be made.

The liability of defendants/intervenors springs from their participation in litigating this action and their contribution "to the effort required of the plaintiffs to substantiate their position." Order of June 18, 1984. Apportionment should, therefore, be functionally related to that liability and done according to what their contribution demanded of Akron Center attorneys. The inequities that defendants/intervenors asserted in their opposition to being held liable for any award are totally absent when an award is allocated according to responsibility for the time spent by a plaintiff's attorney.

III. Relationship of Costs in Sixth Circuit to Fees

The decision of the Sixth Circuit in the instant case contained no award of costs. From that fact, defendant and defendants/intervenors argue that Buian v. Baughard, 687 F2d 859, 862 (6th Cir. 1982), compels this Court to deny Akron Center any fees for the appellate work done in the Sixth Circuit.

This argument is so contrary to any reasonable interpretation of 42 U.S.C. §1988 that it ought to be dismissed outright. The notion that so many hours should go uncompensated is one fundamentally inconsistent with both the language and objectives of 42 U.S.C. §1988.

The dicta in Buian had not been reached by any panel in the Sixth Circuit at the time this case was before that Court. To draw any inference about attorney's fees from the failure to award costs, especially an inference so at odds with Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980), and subsequent authority, in light of the sequence is plain error.

Moreover, Akron Center did not prevail on all issues in the Sixth Circuit. Thus, at the time a decision on costs was made, the merits holdings had been somewhat split between the parties. Subsequently, of course, the Supreme Court reversed the Sixth Circuit on those merits holdings, ruling that Akron Center should prevail. The issue before the Court is, of course, whether Akron Center ultimately prevailed, not whether they prevailed at every step in the litigation. Again, any inference about attorney's fees drawn from the Sixth Circuit context is simply illogical.

The language of 42 U.S.C. §1988 provides that fees may be awarded "as part of the costs." That language does not condition the award of such fees on an award of costs. 42 U.S.C. §1988 is a separate statutory provision from, utilizes different discretionary standards than, serves distinct objectives to, and is not inextricably linked with 28 U.S.C. §1920. Cf., R.E.A. v. Piper, 447 U.S. 752 (1980)(tendency in district courts to have costs borne by each party).

The inclusion of a fees award as part of costs under 42 U.S.C. §1988 was not, however, superfluous. In contexts where the objectives being served by costs and fees awards coincide, any reference to costs has been held to incorporate fees. See, e.g., Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983)(for purposes of Fed. R. Civ. P. 68, an offer of settlement must be for costs including attorney's fees). When the purposes diverge, however, as in the instant case, each award is governed by its own legislative pedigree, judicially developed standards, and procedural practice.

In Northcross, 611 F.2d at 639, the Court reversed the trial court in part because it had erred by "apparently assuming that if attorney's fees were not recoverable, neither were costs." The reverse assumption is equally fallacious.

This Circuit could hardly be more clear in its mandate to District Courts. In O'Bryan v. County of Saginaw, 722 F.2d 313, 314 (6th Cir. 1983), a trial court was reversed for not making an award of attorney's fees for appellate work. The Court flatly stated: "[I]ssues concerning the award of attorney's fees for the prosecution of an appeal address themselves in the first instance to the District Court." Id.

Literal application of the Buian dicta is totally contrary to how attorney's fees are to be considered. "The Court of Appeals' order that each side bear its own costs reflects none of the in-depth analysis required for a determination of fees . . . ." Willie M. v. Hunt, 564 F. Supp.363, 366 (W.D.N.Car. 1983). Similarly, this Circuit has affirmed a District Court award of $50,000 in fees, under the American Rule, for the handling of a prior appeal in which the Circuit had ordered both parties to bear their own costs. *Shimman* v. *Operating Engineers, Local 18*, 719 F.2d 879 (6th Cir. 1983). The Sixth Circuit could hardly have meant to eliminate a chunk of the fees' award at bar by a pre-*Buian* one-line statement about costs.

IV. *Fees for Supreme Court Work*

The guiding principle from *Northcross* is that fees must be awarded for "all time reasonably spent on the matter" being litigated. 611 F.2d at 636. This standard alone compels an award for representation in the Supreme Court.

Beyond that, though, *Northcross* directly addressed this very issue. The school desegregation litigation in *Northcross* had progressed to the Supreme Court on the merits. In the attorney's fees decision following that litigation, the Court held: "Services relating to the *various appeals* taken in this case are compensable . . . ." 611 F.2d at 637 (emphasis noted).

The suggestion that any rule of the Supreme Court contradicts this result is transparently empty. Indeed, in *Grendel's Den, Inc.* v. *Larkin*, 582 F.Supp. 1220 (D.Mass. 1984), precisely such an award was made.

V. *Relevant Rate by Court Level*

The critical determinant of the appropriate hourly rate is the prevailing rate "in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 79 L. Ed.2d at 900 n.11. That community may be broadened when special competence is sought. *Palmigiano* v. *Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983).

If lawyers in the relevant community charge differently according to court level, then an adjustment could be appropriate. Akron Center has not made such an argument.

Indeed, that argument may well be precluded by the analysis of an upward adjustment in *Blum*. There, the Court decided that both hours and rate should reflect the increased difficulty of litigation or skill necessary to handle that difficulty. 79 L. Ed.2d at 902-03.

At bar, for example, a nationally recognized expert on reproductive freedom, Janet Benshoof, has sought an hourly rate

---

The very controversial nature of the issues litigated at bar and the presence of the City as a defendant have rendered difficult, however, the presentation of evidence on the prevailing rate charged by attorneys in Akron for complex litigation in the Northern District of Ohio. An invitation from the Court to an Akron lawyer engaged in complex federal litigation would not be so likely to engender rejection.

VII. Analysis of Hensley v. Eckerhart

In Hensley, the Court explained that civil rights cases will often "involve a common core of facts or will be based on related legal theories." 76 L. Ed.2d at 51. "Such a lawsuit cannot be viewed as a series of discrete claims," the Court emphasized. Id. "Instead," the Court ordered, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." 76 L. Ed.2d at 51-52.

The critical standard for such cases was then set by the Court: "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." 76 L. Ed.2d at 52 (emphasis noted).

Of especial relevance to the case at bar, the Court then recognized that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient

Center sustained no real loss on the merits of any of the issues litigated; only a finding of inadequate standing to challenge some regulations was entered. In reviewing the Ordinance, it is apparent that the truly burdensome provisions were struck down on the merits.

Manifestly, the challenge to the anti-choice ordinance adopted by defendant at the behest of defendants/intervenors represented an interrelated set of factual and legal arguments. The key issue was whether Roe could be undermined by such a frontal assault on access to abortions. Rather than presenting distinct issues under Hensley, the challenge consisted of related claims.

In Hensley, the Court approved of the lower court's finding of interrelationship based on a Complaint challenging various conditions at a mental health institution. Both the conditions and the legal standards for measuring them were distinct; nevertheless, the Court approved the finding on interrelatedness "[g]iven the interrelated nature of the facts and legal theories in this case." 76 L. Ed.2d at 53. If Hensley involved interrelated claims, obviously this case does too.

In Mary Beth G. v. Chicago, 723 F.2d 1263 (7th Cir. 1983), the Court applied the interrelatedness test of Hensley. For an unsuccessful claim to be unrelated to a successful one, the Court held, "the relief sought on the unsuccessful claim [must be] intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." Id. at 1279. Defendant and defendants/intervenors course of conduct at bar was single-minded in its uniformity; the goal was to restrict access to abortions, and the means were to assert reasonable governmental interests and argue for a lower degree of judicial scrutiny. Patently, interrelatedness has been shown.

A second aspect of Hensley is relevant here. The Court held "that the extent of a plaintiff's success is a crucial factor in determining the amount of an award of attorney's fees." 76 L. Ed.2d at 54. The Court had earlier in the opinion characterized such success as "excellent results." Id. at 52.

At bar, there is absolutely no room for any finding that Akron Center obtained less than excellent results. To overturn a model ordinance, withstand the challenge of the decade against Roe, and counter the combined effort of the United States, defendant, and defendants/intervenors was a huge, phenomenal success. Anyone of sufficient capacity to comprehend broadcast or print media news reports knows that this case represents a resounding victory for those who believe Roe should be implemented, not circumvented.

In a very similar case, the Honorable Joseph P. Kinneary did not reduce fees under a Hensley analysis when a significant, though interrelated, portion of the relief obtained preliminarily by the plaintiffs was undercut by the Supreme Court funding decisions. See Planned Parenthood Affiliates of Ohio v. Rhodes, C-2-79-687 (S.D. Ohio, Oct. 2, 1983)(copy filed January 24, 1984, in support of Affidavit of Louis A. Jacobs in Support of Attorneys' Fees). Proper application of Hensley to the case at bar produces the same result.

VIII. Multiple Moot Courts and Consultants

As described in the Preliminary Statement to this brief, no precedent on point has been located. Importantly, though, the way the question about multiple consultants is phrased may reflect a mistaken view of Akron Center's fees' request.

No fees have been sought for any consultants on the Supreme Court briefs; only those attorneys who directly worked on the briefs sought compensation. For example, undersigned counsel, Louis A. Jacobs, did several hours of research over a period of days on a precise state law question concerning the availability of alternative court procedures for minors. See Benshoof Affidavit in Support of Attorneys' Fees. None of those hours were sought to be compensated because at that time he had not entered an appearance as counsel and was not directly involved in drafting the briefs.

That kind of consultation was pervasive, however, especially from scholars and litigators who read original drafts of the briefs in and participated in the moot courts for the Supreme Court. The real question, then, is whether the use of multiple attorneys is proper, a question already addressed. See Johnson v. University College, 706 F.2d 1205, 1208 (11th Cir.), cert. denied, 104 S. Ct. 489 (1983)("The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work.").

As before, Akron Center strongly contests the notion that a hindsight review of the number of attorneys is appropriate in measuring whether the number was reasonable. In his testimony in support of the fees' request, Stephan Landsman explained why only two attorneys put in for substantial time in the Supreme Court and five other attorneys were needed there. (Aug. 22, 1983 Transcript at 31-39). A Brandeis brief was considered necessary; indeed, the Supreme Court even favorably referred in its opinion to the research done in support of Akron Center's argument.

Put bluntly, how dare defendant and defendants/ intervenors second-guess that allocation of attorneys when they also used several attorneys, not to mention the resources brought to bear by the United States through the Solicitor General? This Court must never lose sight of the fact that this case was the major reproductive freedom litigation since Roe. The importance of the case fully warranted the legal talent that was mustered.

In a sense, defendant and defendants/intervenors want to quarrel with success, inviting the Court to cheapen the case by reducing the award due to the number of counsel. The message that would send to those private attorneys general currently willing to take on major cases like the instant one is quintessentially at odds with the statutory objective "to ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensley, 76 L. Ed.2d at 48.

Effective, not minimumly competent, access is the goal. Only a contorted view of how zealously litigated and finely honed the points in this case were could justify a Monday morning quarterback call for the second string so as to not run up the score.

Perhaps Justice Jackson best answered the challenge by defendant and defendants/intervenors to the number of moot courts: "Do not think it beneath you to rehearse for an argument. . . . Argue the case to yourself, your client, your secretary, your friend, and your wife [or husband] if she [or he] is patient. Use every available anvil on which to hammer out your argument." Jackson, "Advocacy Before the United States Supreme Court," 37 Cornell L. Q. 1, 9 (1951). See also, Stern & Gressman, Supreme Court Practice 731 (5th ed. 1978)("Only the lawyer who is fully prepared, articulate, and at ease can expect to fulfill the role assigned to him in this great process.")

To argue that three moot courts were too many is just plain silly; there is no question the time was so spent nor that moot courts are reasonably necessary for oral argument preparation. If ever lawyers arguing before the Supreme Court have so much time and inclination that a truly excessive number of moot courts is held, this Court could surely hold them to be unreasonable. Three moot courts are not excessive as a matter of fact or law.

IX. Analysis of Blum v. Stenson

An upward adjustment to the lodestar is available under Blum upon a showing that "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" 76 L. Ed.2d at 903. The critical point is whether "enhancement was necessary to provide fair and reasonable compensation." Id. at 904. Because Blum did not deal with other factors that could render an award unfair or unreasonable, this Court must be guided by that functional litmus and prevailing precedent.

Of utmost importance, Akron Center submits to the Court that a determination of the upward adjustment for quality and results can only be done in the context of the hours and hourly rate awarded. For example, an hourly rate out-of-line with the $95 to $105 one charged for work done in 1978 by New York City Legal Aid Society attorneys in Blum would need to be upwardly adjusted due to the quality and results obtained at bar.

The Court in Blum engaged in a straightforward, quid-pro-quo line of reasoning. "The novelty and complexity of the issues presumably were fully reflected in the number of billable hours," and the "special skill and experience of counsel should be reflected in the reasonablenss of the hourly rates." 76 L. Ed.2d at 901-02. Likewise, "[t]he 'quality of representation' . . . generally is reflected in the reasonable hourly rate," and "acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee." Id. at 902-03. Thus, an upward adjustment for quality and results would be justified were the same rate charged for run-of-the-mill civil and criminal cases in the relevant market used for a piece of complex federal litigation.

Too much has been written and said about this litigation to doubt either that the results obtained were truly excellent or that anything less but the highest quality litigation could have produced them. The reality of this litigation is that a major political-legal question was thrust into the federal courts by defendant and defendants/intervenors in an effort to reverse the fundamental rights gained after Roe. Akron Center could hardly have succeeded with more excellent results: the effort of defendant and defendants/intervenors to deprive individuals of reproductive freedom was resoundingly defeated.

Beyond quality and results, though, an upward adjustment is necessary at bar due to the delay in granting the award. Such delay "obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one."

Johnson, 706 F.2d at 1210. Delay has been recognized in this Circuit as an appropriate upward adjustment factor. Louisville Black Police Officers v. City of Louisville, 700 F.2d 268, 275 (6th Cir. 1983). Accord, Copeland v. Marshall, 641 F.2d 880, 906 n.61 (D.C. Cir. 1980)(en banc).

An upward adjustment is also necessary due to the contingent nature of case. It takes little foresight to recognize that the so-called Nixon-Burger Court would be an inhospitable place to litigate in favor of access to abortions. Moreover, the presence of a model ordinance given national publicity is one ripe for litigation all the way to that Court.

In Blum, the Court found that the record did not present a case for an upward adjustment due to the contingent nature of the litigation and did not consider the role of contingency. 79 L. Ed.2d at 903 & n.17. The two concurring Justices did, however, explain that a contingency upward adjustment was proper. 79 L. Ed.2d at 904 (Brennan, J., concurring).

In Redic v. Watts, No. C-C-82-777-M (W.D.N.Car., May 14, 1984)(excerpt attached hereto), the Court held that "[t]he contingent nature of the litigation also may justify an enhancement of the award." Because the risk factor is not represented, as are novelty, complexity, good quality, expertise, and successful results, in either the hours or the hourly rate, that factor would, under the Blum reasoning, be an appropriate upward adjustment.

Finally, as the testimony of Mr. Landsman reflects, this was a very unpopular case to bring. In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the undesirability of the case was a factor to be considered in the award. Again, neither the hours nor the rate reflect that undesirability, so Blum allows an upward adjustment.

X. Conclusion

The fees' award in this case will be a very large one. No matter how restrictively defendant and defendants/intervenors seek to apply 42 U.S.C. §1988, the bottom line must be in the high six figures. The justification for this figure is clear: Akron Center accepted a tremendous challenge and went to court to uphold constitutional interests against the toughest assault ever mounted in the reproductive freedom area.

Defendant and defendants/intervenors lost. They now must pay for their assault against choice, not with compensatory or punitive damages, but with reasonable attorney's fees. To review this case and not be impressed with the magnitude of the undertaking by Akron Center's private attorneys general is impossible.

The time has past for an end to this litigation, and a fees award commensurate with the hours, effort, and prevailing rates in this federal district must be made or reached through settlement. Akron Center appreciates its burden to try to voluntarily resolve the contested fees issues, Blum, 79 L. Ed.2d at 904 n.19, but must note what is apparent to the parties and this Court: this case remains too hot to handle; settlement is not presently possible because the controversy remains, the adversariality thrives, and the ideological views that created the defective model ordinance persist.

Absent settlement, the duty of this Court is clear. While an award of the required magnitude will no doubt share the unpopularity of the case, the intent of Congress in this matter is evident. In light of the controlling precedent, persuasive arguments, and reality of this case, an appropriate award should be made.

Respectfully submitted,

Louis A. Jacobs

LOUIS A. JACOBS
Trial Attorney
American Civil Liberties Union
of Ohio Foundation, Inc.
360 South Third Street
Suite 150
Columbus, Ohio 43215
(614) 228-8952

GORDON J. BEGGS
Legal Director
American Civil Liberties Union
of Cleveland Foundation, Inc.

1223 West 6th Street
Cleveland, Ohio 44113
(216) 781-6276

ALL CO-COUNSEL OF RECORD

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs Akron Center for Reproductive Health, et al., Brief in Response to Questions Posed in June 18, 1984 Order has been served on defendants and defendants/intervenors, through their counsel, by placing a copy in stamped envelopes, first class postage prepaid, respectively addressed to Harold K. Stubbs, Law Director, City of Akron, 166 S. High Street, Akron, Ohio 44308, and Alan G. Segedy, Esq., 40 E. Mill Street (at Main), Akron, Ohio, 44308, and placing those envelopes in a United States Postal Service depository this 14th day of July, 1984.

Louis A. Jacobs

LOUIS A. JACOBS

MABLE A. REDIC, Plaintiff vs GARY H. WATTS REALTY COMPANY,
DAVID S. SCHWARTZ and SHIRLEY E. SCHWARTZ, Defendants

No. C-C-82-777-M

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA Charlotte Division

Slip Opinion

May 14, 1984

OPINIONBY: McMILLAN

Slip Opinion

OPINION:
ORDER AWARDING ATTORNEY'S FEES

This case was tried before a jury on January 26, 27 and 30, 1984. The jury returned a verdict in favor of plaintiff, finding that defendant David Schwartz had extended credit to plaintiff in the form of a mortgage loan on plaintiff's residence, while failing to make the disclosures required by the Truth in Lending Act, 15 U.S.C. § 1601 et seq. On March 9, 1984, the court entered judgment on the jury's verdict, ordering defendants to reconvey to plaintiff all of their interest in plaintiff's former home, upon various conditions, including plaintiff's tendering to defendants $1,056.00, the amount of principal of the credit transaction. Plaintiff's counsel has filed a petition for an award of a reasonable attorney's fee pursuant to 15 U.S.C. § 1640(a)(3).

II.

When an applicant for a fee has carried the burden of showing that the claimed rate and the number of hours are reasonable, the resulting product may properly be found to be the reasonable rate. Blum v. Stenson, supra, U.S. at , 52 U.S.L.W. at 4380. Nevertheless, "[t]he product of reasonable hours times a reasonable rate does not end the inquiry." Hensley v. Eckerhart, supra, U.S. at , 51 U.S.L.W. at 4555. The court may consider an enchancement of the fee award in some cases of "exceptional success," Id. The contingent nature of the litigation also may justify an enhancement of the award. See Blum v. Stenson, supra, at , 52 U.S.L.W. at 4381 (Brennan and Marshall, JJ, concurring). Finally, where the results are exceptional and where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged, the court may accordingly make an upward adjustment in the rate of compensation. Id. at , 52 U.S.L.W. at 4380.

This was a contingent fee case. Plaintiff's counsel had no hope of compensation for his services unless the case was won. Adequate fees are necessary in contingent fee cases both to compensate the attorney for the risk of losing, and thus receiving no remuneration for services, and also to insure that competent counsel are willing to take such cases.

Slip Opinion

The court concludes that for the foregoing reasons, plaintiff's fee award should be increased by 25%.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. et al.	)	Civil Action C78-155A
	)	Judge: Dowd
Plaintiffs	)	
v.	)	
CITY OF AKRON, et al.	)	**BRIEF OF DEFENDANT-INTERVENORS IN OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY FEES**
Defendants	)	

Defendant-Intervenors, Francois Seguin, M.D. and Patricia K. Black, respectfully submit the within brief in accordance with the Order of this Court of June 18, 1984 requesting the further briefing of eight specific issues by the parties.

PRIOR BRIEFS

Defendant-Intervenors call the Court's attention to the following memoranda which have been previously submitted to the Court by them relating to the question of the award of attorney fees:

1. Defendant-Intervenors' Written Statement of Reasons in Opposition to Plaintiffs' Motion for Award of Attorney Fees, filed on or about November 5, 1979;

2. Defendant-Intervenors' Reply to Plaintiffs' Omnibus Response Concerning Attorney's Fees and Costs, filed on or about November 28, 1979;

3. Defendant-Intervenors' Supplemental Memorandum re Award of Attorney Fees, filed on or about January 24, 1980;

4. Memorandum of Defendant-Intervenors in Opposition to Plaintiffs' Motion for Award of Attorney Fees, filed on or about August 15, 1983;

5. Supplemental Memorandum of Defendant-Intervenors in Opposition to Plaintiffs' Motion for Award of Attorney Fees, filed on or about August 22, 1983; and

6. Second Supplemental Memorandum of Defendant-Intervenors in Opposition to Plaintiffs' Motion for Award of Attorney Fees, filed on or about October 31, 1983.

NEW CASES

Defendant-Intervenors call the attention of the Court to the following unreported case of Wolfe v. Stumbo, No. C 80-0285 L(A) (D.C. Ky. 12/15/83), which is attached hereto as Exhibit A, and which vacates the previous order of that court assessing attorney fees against the intervening defendants.

QUESTIONS BRIEFED

In its order of June 18, 1984 this Court requested that the parties brief the following questions:

1. Should the court make an apportionment of liability for attorneys' fees between the city-defendants and the intervenor-defendants?

2. Does the Sixth Circuit's failure to tax costs to the defendants in this action preclude an award of attorneys' fees for work before the Sixth Circuit?

3. Is plaintiffs' counsel entitled to an award of attorneys' fees for work before the United States Supreme Court?

4. Is the relevant market for determining hourly rates different for work before District Court, Court of Appeals, and the Supreme Court?

5. If the Court concludes that the relevant community for determining any portion of the prevailing market rates to be used in calculating the award is Akron, does the Court have the authority to call members of the Akron legal community as its own witnesses to testify regarding prevailing market rates?

6. Pursuant to the analysis set forth in Hensley

v. Eckerhart, 103 S. Ct. 1933 (1983), should this Court exclude any elements of plaintiffs' applications for attorneys' fees?

7. How have other courts analyzed the reasonableness applications for attorneys' fees (a) for multiple moot court exercises in preparation for Supreme Court argument? and (b) for the work of multiple consultants who assist in preparaing Supreme Court briefs?

8. Under the standards set out in Blum v. Stenson, 104 S. Ct. 1541 (1984), should plaintiffs' counsel receive an upward adjustment from lodestar?

ARGUMENT

1. Should the court make an apportionment of liability for attorneys' fees between the city-defendants and the Intervenor-defendants?

THE COURT SHOULD MAKE AN APPORTIONMENT OF LIABILITY FOR ATTORNEYS' FEES BETWEEN THE CITY-DEFENDANTS AND THE DEFENDANT-INTERVENORS, WITH JOINT LIABILITY AS TO ISSUES APPLICABLE TO DEFENDANT-INTEVENORS AND SOLE LIABILITY FOR THE CITY-DEFENDANTS AS TO ISSUES BEYOND THE SCOPE OF DEFENDANT-INTERVENORS' INTERVENTION.

Although Defendant-Intervenors still submit to this Court the impropriety as well as unconstitutionality of awarding attorneys' fees against them, they must address this question as requested by the Court. The Court possesses within its discretion the ability to apportion attorneys' fees among the city-defendants and Defendant-Intervenors, and the circuit courts of appeal and other district courts have exercised this discretion in certain instances where appropriate to the particular circumstances of the case. Crosby v. Bowling, 683 F.2d 1068 (7th Cir. 1982); Harrington v. DeVito, 656 F.2d 246 (7th Cir. 1981); Miller v. Carson, 628 F.2d 346 (5th Cir. 1980); Decker v. U.S. Dept. of Labor, 564 F. Supp. 1273 (E.D. Wis. 1983). The Crosby court relied on "due considerations to the degree of liability attributable to the two classes of defendants . . .." 683 F.2d at 1075. (emphasis added) In Harrington, the defendant Illinois Department of Mental Health was assessed 20% of plaintiff's attorneys' fees. This was upheld by the 7th Circuit Court of Appeals on the grounds that the state's claim of lack of liability under state law overlooked the fact that the Department was sued for constitutional violations. 656 F.2d at 268.

The Court in Miller noted that "(a)pportionment of attorneys' fees is appropriate when the plaintiff has brought several distinct causes of action . . .." (Footnote 3) 628 F.2d at 349. In Decker apportionment was based upon the fact that a number of defendants had settled early and also upon the fact that the roles of the remaining defendants were not equal. Additionally, the Court in Decker was able to rely in substantial part on itemized time sheets kept by plaintiffs' attorneys as to how much effort went into the litigation of the distinct claims involved.

The answering of this question as posed by the Court is not the proper place to comprehensively discuss the apportionment. However, justice would dictate that Plaintiffs recover their fees only as to those provisions of the ordinance upon which they prevailed and as to those claims upon which they were successful. For example, a tremendous amount of the time spent by Plaintiffs' counsel related to claimed violations of the Free Exercise Clause and Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in which they were totally unsuccessful. Furthermore, Plaintiffs prevailed as to only about 20% of the provisions they challeged, some of which they were found not even to have standing to challenge. Defendant-Intervenors were involved with the parental issues in the case. Although the parental consent requirement was ultimately struck down, the parental notificaton requirement defended by Defendant-Intervenors was upheld.

If this Court should find Defendant-Intervenors liable for attorneys' fees, their liability should be limited to joint liability with the city-defendants only as to attorney time shown to be applicable to the parental consent requirement. Any further award of attorneys' fees as to other issues should be limited to the sole liability of the city-defendants.

2. Does the Sixth Circuit's failure to tax costs to the defendants in this action preclude an award of attorneys' fees for work before the Sixth Circuit?

UNDER RULE 39 OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE SIXTH CIRCUIT'S DENIAL OF COSTS TO PLAINTIFFS PRECLUDES AN AWARD OF ATTORNEYS' FEES FOR WORK DONE BEFORE THE SIXTH CIRCUIT.

Rule 39(a) of the Federal Rules of Appellate Procedure provides in relevant part: "Except as otherwise provided by law, . . .; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court . . .." (emphasis added) Appellate Rule 39(e) also provides in relevant part: "costs incurred in the preparation and transmission of the record, (etc.) . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule." (emphasis added) 42 U.S.C.A. Section 1988 provides, " . . ., the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." (emphasis added)

In Buian v. Baughard, 687 F.2d 859 (6th Cir. 1982), the Sixth Circuit construed Section 1988 in light of Fed. R. Civ. P. 54(d), Fed. R. App. P. 39(a), and Sup. Ct. R. 50, and determined that attorneys' fees are to be awarded to a prevailing party only if costs are awarded to that party at the level for which fees for services are sought. Id., at 82 & n.5. Judge Kennedy stated:

> "Each court has jurisdiction to make de novo awards of costs only for proceedings within its jurisdiction. . . . a prevailing party is not entitled to attorney's fees for appeals as part of district court costs. Instead, a party must be entitled to receive costs on appeal as a result of the appellate court's award of costs before it is eligible to receive attorney's fees as a part of those costs under section 1988." Id., at 861. (emphasis added)

In its judgment of June 12, 1981, the Court of Appeals for the Sixth Circuit "affirmed in part and reversed in part" the judgment of this Court and ordered: No costs taxed." Thus, it would seem clear that the specific order of the 6th Circuit expressly denying an award of costs in the case before this Court precludes plaintiffs from recovering attorneys' fees for work done before the 6th Circuit.

3. Are plaintiffs' counsel entitled to an award of attorneys' fees for work before the United States Supreme Court?

UNDER RULE 50 OF THE SUPREME COURT RULES, PLAINTIFFS' COUNSEL IS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES FOR WORK BEFORE THE UNITED STATES SUPREME COURT.

Rules 50.1 and 50.2 of the Rules of the Supreme Court of the United States provide for costs to be paid by the petitioner in the case of affirmance of any judgment or decree by the Supreme Court and costs to be allowed to the petitioner in the case of a reversal, "unless otherwise ordered by the Court." (emphasis added) Sup. Ct. R. 50.6 provides:

> "When costs are allowed in this Court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate or other proper process sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the clerk any bill of costs."

These provisions of Rule 50 make clear the absolute and sole discretion allowed the Supreme Court and the clerk in awarding any and all costs in a particular case before it. 13 Moore, Para. 850.04 at SC 50-11.

In its order of June 15, 1983, pertaining to both cases Nos. 81-746 and 81-1172, the Supreme Court "affirmed in part and reversed in part with costs, . . .," further stating:

> "IT IS FURTHER ORDERED that petitioners, Akron Center for Reproductive Health, Inc., et al., recover from City of Akron, et al. Three Hundred Dollars ($300.00) for their costs herein expended." (emphasis added)

The Supreme Court granted two writs of certiorari in this case. Plaintiffs were petitioners in No. 81-1172 and respondents in No. 746. It must be first noted that the foregoing order of the Supreme Court is applicable to the award of costs in both cases, and a total award of $300.00 was made. Secondly, the award is made to Plaintiffs ("petitioners, Akron Center for Reproductive Health, Inc.") only as "petitioners" and not as respondents. Thus, an award of costs is being made only as to No. 81-1172, the case dealing solely with the second-trimester hospital requirement, and not as to No. 81-746. Defendant-Intervenors had no involvement in No. 81-1172 before the Supreme Court. Thirdly, it appears that since Plaintiffs are to recover their costs from "City of Akron, et al." (the city-defendants), Defendant-Intervenors are not even liable for the $300.00 costs awarded by that Court.

Again, the award of attorneys' fees is made "as part of the costs." (42 U.S.C. Section 1988) Therefore, this Court is without a grant of power to award attorneys' fees for work done before the Supreme Court, just as it is for work done before the Court of Appeals. This view is consistent with Buian v. Baughard, supra, where the court cites Section 1988 and Supreme Court Rule 50 as authority for its position that attorneys' fees are to be awarded only if costs are awarded at the level for which fees are sought, here, the Supreme Court level. The Supreme Court, in 81-1172, taxed a specific amount, $300.00, which includes *all* costs for work done before it. Therefore, Plaintiffs' *total* costs can only be $300.00 for 81-746 and 81-1172 and only recoverable from the city-defendants. It should be observed that *Buian* is expressly made applicable to "appeal*s*" (emphasis added), and not simply an appeal to the Court of Appeals. *Id.*, at 861.

4. *Is the relevant market for determining hourly rates different for work before District Court, Court of Appeals, and the Supreme Court?*

THE RELEVANT MARKET FOR DETERMINING HOURLY RATES FOR WORK BEFORE THE DISTRICT COURT, COURT OF APPEALS, AND THE SUPREME COURT SHOULD BE THAT OF AKRON, OHIO, THE SITUS OF THE CONTROVERSY.

This question would only become relevant with respect to the Supreme Court and Court of Appeals levels if the Court refuses to follow *Buian*, *supra*. The Supreme Court has said that Section 1988 and its legislative history make it clear that "reasonable fees" are to be calculated according to prevailing market rates in the relevant community. *Blum v. Stenson*, 104 S. Ct. 1541 at 1546-47 & f.n. 8-10. There is no indication in that opinion that the relevant *community* is to be anything other than the community where the district court sits. Therefore, the relevant community for determining the prevailing market rate for attorneys' fees should be the Akron area.

5. *If the Court concludes that the relevant community for determining any portion of the prevailing market rates to be used in calculating the award is Akron, does the Court have the authority to call members of the Akron legal community as its own witnesses to testify regarding prevailing market rates?*

THE COURT DOES HAVE THE AUTHORITY TO CALL MEMBERS OF THE AKRON LEGAL COMMUNITY TO TESTIFY REGARDING PREVAILING MARKET RATES.

Rule 614(a) of the Federal Rules of Evidence provides in part that "(t)he court may, on its own motion . . ., call witnesses, ..." *Blum v. Stenson*, *supra*, also provides some guidance as to this question. In *Blum* the Court recognized that determining an appropriate "market rate" for the services of a lawyer is inherently difficult.

> "In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, *the burden is on the fee applicant to produce satisfactory evidence* - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to - for convenience - as the prevailing market rate." 104 S.Ct. 1541, 1547 (f.n. 11) (emphasis added)

6. *Pursuant to the analysis set forth in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), should this Court exclude any elements of Plaintiffs' applications for attorneys' fees?*

PURSUANT TO HENSLEY V. ECKERHART THIS COURT SHOULD EXCLUDE NUMEROUS ELEMENTS OF PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES.

In *Hensley v. Eckerhart*, ____U.S.____, 103 S. Ct. 1933 (1983), the Supreme Court held that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an attorney's fee award under Section 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. However, where plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the result obtained. 103 S. Ct. at 1943. However, the Court also noted that "(t)he amount of the fee, of course, must be determined on the facts of each case." Id., at 1937.

Hensley makes it clear that the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount where plaintiff has achieved only partial or limited success.

> "If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." Id., at 1941.

The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates, Id., at 1941, and

> "(w)here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in cosidering the amount of a reasonable fee." Id., at 1943.

The applicant should also exercise "billing judgment" with respect to hours worked and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." Id., at 1941. The Court cites with approval a quote from the United States Court of Appeals for the First Circuit in Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978), which noted:

> "As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorneys' fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims." 103 S. Ct. at 1941, f.n. 12.

Since this Court tested the subject ordinance on a section-by-section basis, it would appear that the Court would need to take into account the time spent by the attorneys per section in order to arrive at a reasonable fee to be awarded. On that basis Plaintiffs were only partially successful in their lawsuit. As to the attack upon the parental consent and parental notification provisions of the ordinance which Defendant-Intervenors helped to defend along with the city-defendants, Plaintiffs were only 50% successfull. Defendant-Intervenors' role in defense of the rest of the ordinance was only as amici, so an apportioned award against them could only be for defending and losing with respect to Section 1870.05(B), the parntal consent provision.

The same consideration must be given with respect to the theories upon which Plaintiffs pursued this case. Plaintiffs' counsel spent and inordinate amount of time in this case in pursuit of claims that the Akron ordinance violated the Free Exercise Clause and Establishment Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment, with two of Plaintiffs' attorneys devoting virtually all of their time to the religious issues. This Court and the Court of Appeals totally rejected all such attacks on the ordinance, which attacks at the very least border on the frivolous, since numerous courts, including the Supreme Court, have denied such claims.

> "Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' (citation omitted) The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if the had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 103 S.Ct., at 1940. (emphasis added)

If this Court were to award Plaintiffs their attorneys' fees as against Defendant-Intervenors, it should only be with respect to their attorneys' time spent in pursuit of invalidation of Section 1870.05(B) of the ordinance upon the theory that it is violative of the Due Process Clause of the Fourteenth Amendment. Plaintiffs have the burden of "documenting" this time and the duty to "maintain billing time records" that "will enable a reviewing court to identify distinct claims." Id., at 1941.

7. How have other courts analyzed the reasonableness of applications for attorneys' fees (a) for multiple moot court exercises in preparation for Supreme Court argument? and (b) for the work of multiple consultants who assist in preparaing Supreme Court briefs?

ANALYSIS OF REASONABLE ATTORNEYS' FEES FOR (A) MULTIPLE MOOT COURT EXERCISES IN PREPARATION FOR SUPREME COURT ARGUMENT AND (B) FOR THE WORK OF MULTIPLE CONSULTANTS WHO ASSIST IN PREPARING SUPREME COURT BRIEFS SHOULD RESULT IN A REDUCTION OF TIME FOR DUPLICATION.

The threshhold question to consider here is does the Supreme Court's taxing of $300 total costs in 81-1172 and -0- in 81-746 preclude the recovery of these types of items at the district court level under Buian v. Baughard, supra. However, if this court decides to disregard Buian, it will need to rely on the cases not directly on point, since it does not appear that the courts have dealt with these specific questions.

In Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir. 1980), the Court of Appeals for the Sixth Circuit indicates that hours may be cut for duplication. Likewise, in Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. 12/24/81), then District Judge Wellford reduced hours as a duplicative charge where there was "consultation time." Slip Opinion at 3. Finally, in the recent unreported case of Planned Parenthood Association - Chicago Area v. Kenpiners, No. 81 C 332 (D.C.

Ill. 6/14/84) (Slip Opinion attached hereto as Exhibit B), the court made a reduction in hours by two-thirds in the time spent on the briefs and oral argument. In that considerable duplication of time and effort is shown by Plaintiffs' affidavits, as well as an excessive amount of time, the Court should reduce the claimed hours accordingly.

8. Under the standards set out in Blum v. Stenson, 104 S. Ct. 1541 (1984), should plaintiffs' counsel receive an upward adjustment from lodestar?

UNDER BLUM V. STENSON PLAINTIFFS' COUNSEL SHOULD NOT RECEIVE AN UPWARD ADJUSTMENT FROM LODESTAR.

In Blum v. Stenson, 104 S. Ct. 1541 (1984), the Supreme Court held that a) under 42 U.S.C. Section 1988 "reasonable fees" are to be calculated according to the prevailng market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel, id., at 1547, and that b) the district court is authorized, in its discretion, to allow the prevailing party an upward adjustment in attorneys fees in cases of exceptional success. Id., at 1548.

After rejecting petitioner's argument in Blum that an upward adjustment of a reasonable attorneys' fee is always improper, the court addressed itself to the issue of when it is permissible. The district court had granted a 50% upward adjustment of the fee, determined by calculating a reasonable hourly rate ("prevailing community") times the reasonable amount of hours expended. The increase was based upon the complexity of the litigation, the novely of the issues, the high quality of representation, the "great benefit" to the class, and the "riskiness" of the law suit. 104 S. Ct. at 1548. The Supreme Court rejected these conclusions as unsupported and reversed the upward adjustment. The court noted: "Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award," Id., at 1549, and that presumably this should be "reflected in the number of billable hours recorded by counsel." Id., at 1548. In a case where the experience and special skill of the attorney will require the expenditure of fewer hours, this "should be reflected in the reasonableness of the hourly rates." Id., at 1549. Also, the Court noted:

> "The 'quality of representation,' however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" 104 S. Ct. 1549.

The Court also concluded that the "great benefit to a large class of needy people" determination of the district court should not provide an independent basis for increasing the fee award. Id., at 1549 & f.n. 16. Finally, the court noted the district court's failure to identify any "risks" associated with the litigation or any claim that the risk of nonpayment required an upward adjustment to provide a reasonable fee.

In light of the Blum analysis, Plaintiffs in this case are not entitled to an upward adjustment. This case simply does not represent the "exceptional success" necessary to justify such an adjustment.

Respectfully submitted,

SEGEDY, UMBAUGH & SHARP

Alan G. Segedy

Alan G. Segedy
Law and Commerce Building

40 E. Mill Street (at Main)
Akron, Ohio 44308
(216) 253-5535

and

Robert A. Destro
The Columbus School of Law
Catholic University
Washington, D. C. 20064
(202) 635-5146

Attorneys for Defendant-
Intervenors Francois Seguin, M.D.
and Patricia K. Black

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Defendant-Intervenors in Opposition to Plaintiff's Motion for Award of Attorney Fees was served by regular U. S. Mail to Harold K. Stubbs, Law Director, City of Akron, Attorney for Defendants, 166 S. High Street, Akron, Ohio 44308, and Louis Jacobs, Attorney for Plaintiffs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio 43210, this 16th day of July, 1984.

Alan G. Segedy

Alan G. Segedy
Attorney for Defendant-
Intervenors Francois Seguin
and Patricia K. Black

Argument

I. THE DISTRICT COURT ERRED IN RULING THAT SECTION 1870.05 WAS UNCONSTITUTIONAL BECAUSE OHIO REVISED CODE, SECTION 2151.28, PROVIDES THAT PARENTS OR LEGAL GUARDIANS SHALL RECEIVE NOTICE AND AN OPPORTUNITY TO BE HEARD IN ALL JUVENILE PROCEEDINGS.

In its decision dated August 22, 1979, the District Court ruled that Sections 1870.05 (A,B) were unconstitutional because, Ohio Rev. Code Section 2151.28 provides that, except in emergencies, parents and legal guardians receive notice of all pending judicial proceedings in the juvenile court to which their children are parties. Intervenors respectfully submit that the District Court not only misread both Bellotti v. Baird (I), 428 U.S. 132 (1977), and Bellotti v. Baird (II), 99 S.Ct. 3035 (1979), but that the purported constitutional rule enunciated by the District Court is unconstitutional on its face.

In Bellotti (II), supra, the Supreme Court of the United States, in a divided opinion with no majority, explained that it would be unconstitutional for a state to require parental notice of a proposed abortion prior to a minor's attempt to invoke the power of a juvenile court to consent to an abortion because the parents might prevent the minor from going to court, 99 S.Ct. 3035 at 3050. Unlike the Massachusetts law at issue in Bellotti, the Ohio law which is alleged to be the basis for the unconstitutionality of Section 1870.05 has nothing to do with abortion. Ohio Rev. Code, Sections 2151.19 - 2151.24, governs the procedure of all juvenile proceedings in the State of Ohio, and reflects a procedural due process requirement of notice prior to state action which can have an adverse impact upon important personal rights and interests. Thus, the proper method for analyzing the ordinance itself is to examine it first on its face, and thereafter, as applied.

Section 1870.05 divides unemancipated minors into two age groups: those 15 and older, and those younger than 15 years of age. The record amply supports the distinction, (see e.g., Tr. III, 120) and there is no finding of the District Court that the age distinction is either unreasonable or arbitrary. In effect, it treated the facts as being irrelevant, and the decision was made as a purely legal question governed by Bellotti (II) and not its own merits.

The facts, however, are important, both as to the facial and "as applied" constitutionality of Section 1870.05. Section 1870.05(A) provides that a clinic in the City of Akron may not perform an abortion on an unemancipated minor over the age of 15 and under the age of 18 (the age of majority in Ohio) unless her parents have been notified or unless a court grants permission for the abortion. When a minor is under the age of 15, Section 1870.05(B) provides that the clinic may not perform the abortion unless her parents are notified and at least one of them consents, or consent is given by a court. The ordinance therefore passes the constitutional test devised by the Supreme Court in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

In Danforth, the Supreme Court found a Missouri statute requiring parental consent prior to abortion unconstitutional because it left the parents with an absolute veto over a minor's decision to have an abortion. Section 1870.05 does not provide anyone with an "absolute" (i.e., unreviewable and possibly arbitrary) veto. Section 1870.05(A) is a "pure notice" statute covering minors aged 15-17, and parents are given no role to play except that of consultant and counsellor should they so desire. Section 1870.05(B) provides that the consent of one parent must be obtained prior to the abortion, but a court may provide consent where the parents are either unavailable or refuse consent. Bellotti (II), supra, requires no more.

> "We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent it must provide an alternative procedure[23] whereby authorization for the abortion can be obtained. . . . n.23 . . . we discuss the alternative procedure described in the text in terms of judicial proceedings. We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court . . . ." Bellotti (II), supra, 99 S.Ct. at n.23 and text (emphasis added).

Beyond this, Section 1870.05 has no application. It does not purport to determine either the nature of the judicial alternative or the procedure to be followed in such cases. A city such as Akron is prohibited by Ohio statutory and constitutional principles from legislating in areas in which the state has already made policy. Ohio Const. Art. XVIII, Section 3. Any attempt by it to do so would be a nullity under Ohio law. Lies v. Cleveland Ry. Co., 101 Ohio St. 162, 166, 128 N.E. 73 (1920) (Syllabus #2) (laws passed upon by the General Assembly for application throughout the state); Akron v. Scalera, 135 Ohio St. 65, 19 N.E. 2d 279, 13 Ohio Ops. 376 (1939) (Syllabus #1) (laws applicable to the same subject matter). For Akron to have structured Section 1870.05 in the manner contemplated by the District Court was impossible: any such legislation would be unconstitutional under both federal and state law.

The gravaman of the clinics' problem with Section 1870.05, therefore, is not that it provides a "veto", but that it provides for a proper judicial proceeding as contemplated by the express language of Danforth and both Bellotti cases. The District Court's decision, therefore, does not even focus on Section 1870.05, but rather on a statutory and judicial plan that was not challenged in the complaint, and which is clearly constitutional.

II. CHAPTER 2151 OF THE OHIO REVISED CODE AND THE OHIO RULES OF JUVENILE PROCEDURE CREATE THE MINIMUM CONSTITUTIONALLY ADEQUATE FRAMEWORK FOR A RESOLUTION OF DISPUTES OVER THE PROPER MEDICAL TREATMENT OF UNEMANCIPATED MINORS.

A. Chapter 2151 of Ohio Revised Code and the Ohio Rules of Juvenile Procedure Are Constitutional on Their Face and "As Applied" to a Minor Seeking Judicial Consent for Abortion.

The fundamental error of the District Court's decision is its complete disregard of well-settled principles of procedural due process. Although Chapter 2151 of the Ohio Revised Code and the Ohio Rules of Juvenile Procedure were not challenged "as applied" to judicial proceedings in which a minor seeks abortion, they clearly provided the basis for the District Court's holding that Section 1870.05 was unconstitutional. (Opinion, 53). The incongruity of such a holding is immediately apparent upon examination of the procedure envisioned by the allegedly "unconstitutional" procedure established by Chapter 2151.

Under Ohio law, a minor who desires judicial consent for medical procedure, or a physician who seeks judicial protection from subsequent civil liability to parents for unauthorized treatment of an unemancipated minor, or any other person who deems it appropriate (e.g., a teacher, relative, boyfriend, neighbor, etc.) may file a petition invoking the juvenile court's jurisdiction. Ohio Rev. Code Section 2151.23; Rule 10, Ohio R. Juv. P. There is no requirement in either Chapter 2151, Rule 10, or Section 1870.05 that any person be notified prior to the filing of the petition, and Section 2151.28 of the Ohio Revised Code and Rule 10(a) specifically provide that "any" person may file the complaint.

In Smith, supra, the Court held that notice and an opportunity to be heard were required to protect the rights of foster parents in the custody of their foster children. In the case at bar, it is the custodial rights of natural parents — rights which are entitled to even greater deference than those of foster parents — which are at issue. It is well settled that parental custodial rights come within the protection of the First and Fourteenth Amendments, Yoder, supra, and that a lack of notice and an opportunity to be heard in such matters constitutes a denial of due process. In re Gault, 387 U.S. 1 (1967); Anonymous v. Anonymous, 353 So. 2d 515 (Ala. Civ.App. 1977).

B. The Decision of the District Court Fails to Recognize the Custodial Rights of Parents

Prior to embarking upon a discussion of the failure of the District Court to recognize the overbreadth of its own opinion and the constitutionality of state-mandated "parental bypass," it is imperative that adequate consideration be given to the notion of parental custody rights and the degree to which they are affected by the practices which appear in the record. In Burge v. City and County of San Francisco, 41 Cal. 2d 608, 262 P.2d 6 (1953), the California Supreme Court, became one of the first jurisdictions to attempt to explain the meaning of the term "custody," stating:

> "Custody embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings, and the right to direct his activities and make decisions regarding his care and control, education, health and religion. These rights are exercised by both parents in an undivided home, and differences between them are ordinarily resolved at home without the necessity of invoking the aid of court. 262 P.2d at 12." (citations omitted, emphasis added).

The Court employed this definition in its holding that a divorced mother given joint custody of her child with her former husband had the power to bind her minor child to a legal settlement in a personal injury action when she had personal custody. Since Burge, a few jurisdictions have attempted to elaborate upon Justice Traynor's definition. In Delgado v. Fawcett, 515 P.2d 710 (Alaska 1973), the Alaska Supreme Court stated:

> " '(c)ustody' has no fixed legal signification. It involves a variety of parental rights and duties which vary according to the circumstances of the relationship of the child to the parent. 'Custody' pertains not only to the parental control of the child, but is inseparably linked to the parent's rights of access and companionship with his offspring." 515 P.2d at 712-713. (emphasis added, footnote omitted.)

The Texas Supreme Court adopted a similar view in Liethald v. Plass, 413 S.W.

2d 698 (Tex. 1967) (custody and visitation rights), holding that "(c)ustody of a child connotes the right to establish the child's domicile and includes the elements of immediate and direct care and control of the child, together with provision for its needs." 413 S.W. 2d at 700. (Emphasis added).

The Ohio courts have set guidelines for the definition of "custody", which track the language of current Ohio Rev. Code Section 2151.011(A)(10) and which follow the general view set forth above.

> " 'Custody' includes with its meaning every element of provision for the physical, moral and mental well-being of the children. It implies that the person having custody has the immediate personal care and control of the children." Selby v. Selby, 69 Ohio L.B. Abs. 257, 124 N.E. 2d 773-774 (emphasis added.) (1952).

Thus, the term "custody" in a parent-child relationship includes the immediate control and care of the minor along with the right of access in directing the child's activities and decisions regarding educational, moral, and health issues. It is a personal right which resides in a child's parents and has been recognized as such by the United States Supreme Court in May v. Anderson, 345 U.S. 528 (1953). In May, the Court recognized the parents' right to custody as a personal one, and held that procedural due process was essential in any proceeding which could alter custodial relationships.

When a minor seeks an abortion, her parents — not a clinic, its "counselling" staff, or the juvenile court — have the primary custodial right and duty to help the child resolve the moral, educational, and medical questions involved in abortion. Dr. Adele Hoffman, one of Plaintiffs' witnesses, testified that a 14-year-old could give informed consent "with support and guidance." The statement itself concedes the educational and guidance needs of the minor. Such guidance is necessary, she said, because she feels concerned with handing over significant health care decisions "to very young adolescents." (Tr. III, 120). But Dr. Hoffman was quite frank in her feeling that she was "fairly pro-abortion for the very young teenager," and that "maybe we should be encouraging these young people to think of abortion in a rational way: (Tr. III, 121), a perception of abortion and its advisability quite different from that of the intervening parents, Dr. Seguin and Mrs. Black. Dr. Seguin, a practicing board certified pediatrician and an assistant clinical professor of pediatrics of the Northern Ohio Universities' College of Medicine who has an extensive practice (Tr. VII, 53-54 and 63) and experience in counselling adolescents (Tr. VII, 73), is morally opposed to abortion. (Tr. VII, 50). Mrs. Black testified that an abortion "would probably hinder her (daughter) physically, mentally, and spiritually, and that (the daughter) couldn't possibly consider all the sides on her own." (Tr. VI, 53-54).

Interestingly, all the experts, and the lone "lay" parent, Mrs. Black, agree that minors need guidance in making their decision. They only differ on what message should be conveyed to the minor and who should convey it to her. Inexplicably, the District Court chose those who were least qualified to do so: the clinics.

In the case at bar, the District Court created an alleged constitutional rule which flies in the face of settled precedent. When the Supreme Court created the right to abortion in Roe v. Wade, 410 U.S. 113 (1973), it could not have foreseen that the right would be construed so broadly that it would undercut long standing parental constitutional rights to custody and education, see e.g., Yoder, supra; May, supra; Pierce, supra; Meyer v. Nebraska, 262 U.S. 390 (1923), and result in "parental bypass" — the substitution of judicial, or "professional" counselling and education — in an area fraught with moral concerns of particular importance to parents.

The constitutional difficulties inherent in the District Court's approach are compounded by its failure to discuss either the facts which prompted the holding, or the reasons why a pure "notice" statute like Section 1870.05 is unconstitutional. In Bellotti (II), supra, Justice Stevens expressly disclaimed a decision respecting a statute "which does nothing more than require notice to the parents without affording them or any third party an absolute veto." 47 U.S.L.W. at 4977 n.1 (concurring opinion). In the case at bar, Ohio law and Section 1870.05 are clear. Notice is not given until the petition is filed, Ohio Rev. Code, Section 2151.28; consent is only required of one parent of a minor under 15; and that consent may, in any event, be overruled by a Juvenile Court. In Bellotti, a plurality of the Supreme Court held the Massachusetts statute unconstitutional because it feared that if notice were to be given before the minor had an opportunity to seek judicial consent, parents for reasons of their own, might attempt to restrict the minor's access to court, and thereby, frustrate the minor's right to a judicial determination on the question. 99 S.Ct. 3035 at 3050. In the case at bar, the timing problem simply does not exist.

The record demonstrates that the Intervenors would seek to participate, as is their statutory and constitutional right, in any judicial hearing which would involve their daughters. (Tr. VII, 92). It is respectfully submitted that to allege that such participation presents a constitutional difficulty because of what the parents might say is bad constitutional law. See Pierce, supra, (state may not attempt to standardize children). The Supreme Court has repeatedly held that the state may not take actions which adversely affect important interests without providing notice and an opportunity to be heard. See Part III, Infra. Any reason why the situation should be different in the case of an abortion performed on an unemancipated minor has never been offered. Intervenors submit that any reasons which could be given are either the so-called "hard" cases (e.g., abuse) or are constitutionally suspect on First Amendment grounds.

In the case at bar all the evidence points to a finding that Ohio law is more than adequate to handle the "hard" cases described by some of the witnesses. The Ohio Rev. Code Section 2151.421 requires reporting abuse for the protection of the minor. However, the record indicates that the clinics do not report such abuse as a matter of policy (Tr. III, 84), but only hide behind cases of abuse as an excuse for performing abortions. Their actions indicate they do nothing to correct situations of abuse. (See Tr. VII, 88-89, setting forth proper protective procedures in reported abuse cases).

The record below indicates that Section 1870.05 does not modify the statutory obligation to report abuse. Chapter 2151 of the Ohio Revised Code assures that the juvenile court has the power to protect the child and resolve any potential conflicts, real or imagined, between the minor and her parents. It may even go so far as to terminate custody altogether. By contrast, one of plaintiffs' experts conceded that, in his own experience, a minor suspected of being abused is returned to the very situation from which she came after she has her abortion. (Tr. I, 97). No notice is given to anyone, nor protection afforded the minor. It is clear that the clinics are not really interested in the welfare of the minor at all. Their concern is that she be able to procure an abortion at their clinic. (See Tr. III, 83-85, where the physician tries to get them through the entire process "as quickly as (he) can;" and VII, 8). Such procedure suffers from a lack of common sense and humanitarian concern. It is clearly illegal in Ohio, but practiced by the clinics anyway. The dual operation of Section 1870.05 and Chapter 2151 of the Ohio Revised Code would change that practice and assure that any abuse would be reported. They would protect the minor from abuse or show that the allegation of abuse was a fabrication intended to circumvent parental involvement. In either case, the regulation is designed to offer a real and lasting solution to "hard" cases and protect the integrity of the minor's decision-making process. All the clinics offer is a few minute chat with a stranger from a city 250 miles away (Dr. Bliss is from Cincinnati), and an abortion.

Given the relatively few "hard" cases which the clinics can be expected to encounter, Intervenors submit that the compelling motive for plaintiffs' opposition to Section 1870.05 is their fear that the parents might counsel or encourage their minor daughter not to have an abortion. See e.g., Baird v. Bellotti, 450 F.Supp 997, 1001 (D.Mass. 1978) (pointing specifically to possible "anti-abortion" feelings of parents as grounds to deny parents notice). See generally (Tr. III, 121, arguing a "pro-abortion", "rational" approach); Tr. I, 108, arguing medical need for every adolescent under 15 to have an abortion). But once the judiciary invokes its power to suppress parental views, it crosses the boundary between neutrality and advocacy and its orders violate the First Amendment. The District Court has crossed that boundary, allows wholesale violations of First Amendment rights without a showing of a compelling interest for doing so.

C. The Decision Fails to Recognize the Interest Of the State in Assuring That There is Parental Input to Assist the Minor in Her Decision-Making and to Assist the Physician in Exercising His Best Clinical Judgment.

It has been made irrefutably clear from Roe, supra, and its progeny that the state has an important interest in the health of the pregnant woman (especially minors) and in maintaining medical standards. In Danforth, supra, the Court recognized that its holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." 428 U.S. at 75. In Maher, supra, the Court acknowledged that it had remanded the case to the district court in Bellotti (I) "to determine whether the statute authorized a parental veto over the minor's decision or the less burdensome requirement of parental consultation." 432 U.S. at 473. (Emphasis added)

To the extent that the plurality opinion of the Court in Bellotti (II), supra, can be read to suggest that notice to parents after a judicial proceeding has begun is impermissible, such is clearly not the opinion of a majority of the Court members, as review of the concurring and dissenting opinions reveals. This fact is recognized by the Supreme Court of Utah in a recent as yet unreported decision - the only case decided to date dealing with a pure parental "notice" requirement. H_____ L_____ v. Matheson, et. al., No. 16249 (S. Ct. Utah 12/6/79). There, in reviewing the Utah statute requiring the physician to notify the parents or guardian of the minor woman prior to performing an abortion, the Utah Supreme Court analyzed all of the opinions in Bellotti (II) and concluded that from those opinions one could not discern a clear constitutional doctrine inhibiting a state from enacting a notification requirement of the parents of a minor contemplating an abortion. In analyzing Danforth the Utah Court stated:

> "First and foremost, the statute does not per se impose any restriction on the minor as to her decision to terminate her pregnancy. Second, as mentioned ante, the parent is in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgment. Third, the state has a special interest in encouraging (but does not require), an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child." (Slip Opinion at 9)

This Honorable Court should recognize that, faced with a pure notice requirement as provided in Ohio Revised Code Chapter 2151, the Supreme Court would almost certainly uphold such a provision. Notice to the parents after the commencement of judicial proceedings permits the Court to protect the minor from her parents, if such protection should in that rare case be necessary. The Supreme Court has recognized abortion as a fundamental right. However, that right cannot be so pre-eminent to all other rights as to require the abandonment of sanity and well-established rights of parents and principles of law.

III. PARENTS HAVE FUNDAMENTAL RIGHTS TO CONTROL, EDUCATE, NURTURE AND GUIDE THE ACTIONS OF THEIR MINOR CHILDREN WHICH ANTEDATE THE EXISTENCE OF THE STATE AND WHICH THE STATE IS CONSTITUTIONALLY EMPOWERED TO PROTECT.

A. The Rights of Parents And Their Children are Well-Settled.

1. The Right of Family Integrity is Fundamental.

Prior decisions of the Court establish that among the rights deemed "fundamental" is that of family integrity. Griswold v. Connecticut, 381 U.S. 479 (1965); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce, supra; Meyer, supra. Until a compelling need for outside intervention is shown, neither the state, nor a third-party may interfere with intra-family choices or decisions. See, e.g., Alsager, supra, (on substantive due process grounds); Paige v. Bing Construction Co., 61 Mich. App. 480, 485-486, 233 N.W. 2d 46 (1975); New Hampshire v. Robert H., supra.

In order to support the proposition that the Akron parental consultation and consent provisions have a "chilling effect" on the rights of a minor, and that this Honorable Court should give its approval to a policy of parental exclusion, it must be assumed that, in the absence of evidence of individualized compelling need, the state has no power to "protect" a minor from her parents. In Yoder, supra, the Supreme Court expressly rejected the idea that the State has a right to coerce or otherwise facilitate the defiance of parental authority by the minor because it disapproves of their beliefs and actions:

> "Recognition of the claim of the state . . . would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a state into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters, 268 U.S. 510 (1925).
>
> * * *
>
> "Indeed it seems clear that if the State is empowered as parens patriae, to "save" a child from himself or his . . . parents; . . . the State will in large measure influence, if not determine, the religious future of the child. 406 U.S. at 231,232."

Clearly, one of the major reasons for the clinics' objection to parental involvement is fear that their "supportive" counseling will be diluted or negated by the exercise of parental influence and authority. It is well-settled, however, that the state may not interfere with either the parents' or childrens' rights to reject viewpoints the state deems desirable. When the clinics' interest is to disseminate an ideology or sell a service, no matter how acceptable it might be in the eyes of well-meaning social workers or judges, such an intent or interest cannot outweigh the parents' First Amendment right to avoid becoming unwitting nonparticipants in the counseling and treatment of their children. As stated by the Supreme Court in Wooley v. Maynard, 430 U.S. 705 (1977):

> "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind' . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." 430 U.S. at 714-15.

In State v. Whisner, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976), the Ohio Supreme Court considered, among other things, one of the minimum standards promulgated for Ohio elementary schools, which provided, in part, that "office records (containing 'pertinent pupil information' such as level of assignment, health, test scores, and confidential child study information) are not released to parents or guardians." The parents objected to the standard because they believed "it is very important for a parent to be apprised of everything occurring in school relating to his or her child or

be at all worthwhile, it must discuss the attitudes of the minor toward abortion, contraception, and, if she does not want her parents to know of her pregnancy, her relationships with her parents. One would have to be extremely naive to assume that the topic of parental opposition to abortion or premarital sex does not arise in such conversations. It is uncontroverted that the minors, counselors at the clinics, and the judges of the juvenile court would have to discuss the moral scruples of the parents and the family as well as the morality of the life style involved with teenage sexuality, in order to determine whether, under the District Court's order, the option of parental "bypass" is necessary or advisable.

Counsellors or judges must have a source from which they derive the answers to many of the dilemmas which arise in counselling sessions. It readily can be foreseen that discussions of this type demand that the participants analyze the attitudes of the parents. For purposes of illustration, it can be assumed that a minor might feel that her parents' opposition to abortion is based upon the notion that premarital sex is "wrong or sinful". Similarly, it may be assumed for purposes of illustration that an adolescent continually demands reasons for beliefs and activities. Thus, in a counselling session, the attitudes and beliefs of the parents and family come under strong scrutiny, by the minor, by the group (if group counselling is employed) and by the allegedly "non-judgmental" counsellor. The situation is exacerbated when the purportedly "non-judgmental" counsellor feels that abortion is the "best" choice for a pregnant minor, enabling her to continue her education or future plans without change. The District Court has mandated a policy which effectively insulates the abortion providers' "counselling" sessions in which the opinions, attitudes, morals, and ethical viewpoints of the parents and the minor are brought under scrutiny. But the Court's attitude that parental input is often "essential" strongly demonstrates the inappropriateness of the result, and the unconsitutional nature of the judicial exclusion of parents from the process. Thus, the threshold question is essentially whether the state may, in any fashion, seek to "analyze" or resolve intra-family disputes over matters of education or elective medical treatment having religious or moral components in the absence of a showing of a compelling state interest (e.g., neglect).

It has long been well-settled that the state is forbidden to intrude in the domain of doctrinal disputes over moral or religious matters. In Watson v. Jones, 80 U.S. (13 Wall) 679 (1872) the Court noted:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." 80 U.S. (13 Wall) at 728-729.

Since the clinics' unsupported fear that the minors may not buy their services, but will instead seek illegal abortions or leave town if the parents are informed rests upon a recognition that the parents may be opposed to abortion or a child's choice of clinic, the District Court's order is merely an attempt to avoid or settle an intra-family doctrinal dispute over matters of health, religion, or morality by "protecting" the minor from his or her own parents and the parents from themselves. This attitude was condemned in Yoder. See 406 U.S. at 232.

In the context of family matters touching religious and moral teachings, the rationale of such cases is even more compelling. Thus, a court is forbidden even to be a "non-judgmental" arbitrator in matters between parents and their children where no neglect is shown. For to conclude that the option of parental exclusion must remain open is the essence of mandating ex parte "judgments." In Moore v. East Cleveland, 431 U.S. 494 (1977), the Supreme Court stated:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." 431 U.S. at 503-04. (footnotes omitted).

Given this frank recognition of the inherent sanctity of the family, neither the clinics nor the District Court have a compelling reason — and indeed it is impossible to conceive of one — why the abortion clinics or state-supported counsellors have any interest whatsoever in counselling pregnant minors regarding topics about which parents may desire to consult with and educate their children without notice to the parents.

Since neither the state nor federal government can prefer and teach any particular point of view regarding matters of religious teaching, Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968), and since they are not empowered to resolve controversies between conflicting religious or moral doctrines. See e.g., Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953); cf., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440,452 (1969) ("Thus, a civil court may no more review a church decision applying a state departure-from-doctrine standard than it may apply that standard itself") they should similarly be enjoined from creating a policy where opinions, preferences, or views contrary to those of parents are expressed and "supported" in an inherently unfair setting in which there is no chance for rebuttal. The Ohio Supreme Court wisely noted that when the state attempts to be an "impartial arbiter" its position is fraught with danger:

> "The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man, or more than one class of men, to what extent may it group together conflicting opinions? (O)r may it group together the opinions of all? And where this conflict exists, how thorough will the teaching be? Will it be exhaustive and exact as it is in elementary literature and the sciences usually taught to children? (A)nd, if not, which of the doctrines or truths claimed by each will be blurred over and which taught in preference to those in conflict?" State v. Whisner, 47 Ohio St.2d 181, 207-08; 351 N.E. 2d 750 (1976) quoting Board of Education v. Minor, 23 Ohio St. 211, 249-51 (1872).

Had the framers of the Constitution foreseen government involvement in the affairs of the family, they clearly would have framed provisions akin to the First Amendment's protection of speech and religion because "the government is likely to corrupt the family whenever it attempts to improve it because it has no legitimate authority to set moral goals for individuals." Caplow, The Loco Parent: Federal Policy and Family Life. 1976 B.Y.U.L. Rev. 709, 713.

Thus, in all areas covered by the First Amendment protective umbrella, the Supreme Court has been unwilling to allow governmental second-guessing or control of those who presumptively must control their own destinie the press, the church, and the family. There is absolutely no reason to chang the rule here.

B. The Order of the District Court Approving Parental "By-Pass" Infringes Fundamental Familial Rights.

1. Parental "Bypass" is, in Effect, a Transfer of Custody.

It is only when the integrity of the family unit is broken by divorce, neglect, or abuse that the state or a third-party may seek to terminate parental rights to the custody, care, and nurture of their children. See, Ohio Rev. Code Chapter 2151. Intervenors submit that, given the holding of the District Court and several assumptions which appear to underlie the Supreme Court's holding in Danforth, supra, the main issues in the case at bar involve familial integrity, temporary child custody, and emancipation of minors. The case does not involve state-granted or created rights for parents to "interfere" with their children's wishes, or a "veto" such as that involved in Danforth, supra; rather, it involves impressionable young women in need of guidance and Akron's attempt to create a structure whereby all parties interested in her decision have an opportunity to be heard. Section 1870.05 recognizes the familial and emotional realities of the vast majority of pregnant teens; the opinion of the District Court does not.

Lest there be any misunderstanding of the point raised here, it is simply that the threshold question which the Court below seemed to ignore is that, at bottom, the controversy between clinics, the state, and the parents is over custody of the pregnant minor. This conclusion is inescapable, for it is well-settled that a juvenile court does not even reach the question of "best interest" without a prior finding of parental unfitness justifying a temporary or permanent severance of custody.

> "It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity . . .
>
> "Under our system of government children are not the property of the state to be reared only where and under such conditions as officials deem best.
>
> * * *
>
> "The power of the juvenile court is not to adjudicate what is for the best interests of a child, but to adjudicate whether or not the child is neglected." In re Rose Child Dependancy Case, 1947, 161 Pa.Super. 204, 208, 54 A.2d 297. In re Rinker, 117 A.2d 780 (Pa. Super. 1955). Accord Petition of Kauch, 358 Mass. 327, 264 N.E. 2d 371 (1970)

Since the Supreme Court's decision in Danforth, supra, and, indeed, since Roe v. Wade, supra, the Court's treatment of pregnant minors and the development of constitutional principles in the area of "minors' rights" generally has lost sight of the basic principle, identified by Mr. Justice Frankfurter, concurring in May v. Anderson, 345 U.S. 528 (1953):

> "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." 345 U.S. at 536.

The fact that a particular adolescent is faced with the wrenching problem of an unplanned pregnancy and consults with an abortion clinic or physician who is likely never to see her again to "solve" her dilemma does not automatically negate either the constitutionally protected rights of the parents to consult with and guide their children or the duty of the state to protect that relationship from interference from outsiders. For this Court to uphold the District Court's decision is to radically alter - without compelling reason - the distribution of parental (i.e. custodial and consultative) power over children, placing it in the hands of physicians, social workers, and the state courts.

In the case at bar, parental bypass is the functional equivalent of allowing another adult (the "counsellor", judge, or physician) to act in the place of the parent when serious questions relating to their objectivity, qualifications to guide another's child, and proper role remain unresolved. The counsellor or physician collects a fee, the amount of which may vary according to the decision made by the minor. Under the District Court's formulation the juvenile judge or case worker, on even more tenuous ground, becomes not only the arbiter but the parent, deciding not only the qualifications of the absent parent and the maturity of the child, but the "best interests" of the minor. In either situation the absence of the only persons who, in the absence of evidence to the contrary, can be presumed to know and care for the child — the parents — is notable. Intervenors submit that it is clearly unnecessary under the facts of this case.

The District Court, eschewing any discussion of the limitations on its own power to negate constitutionally protected interests, held that the state is powerless to assure that parents will be consulted on so serious a health matter as abortion. Leaving aside, for the present, the question of just how a parent is to determine what interests are parental and which are allocable to the child per se, examination of the reasons recognized in Baird v. Bellotti, supra, are instructive:

> "Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or a continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions." 450 F.Supp. at 1001.

Intervenors submit that the entire approach of the Court below rests on a sub rosa assumption like this one, and is constitutionally deficient because it engenders exactly the same type of paternalism condemned by the Supreme Court in Smith, supra, at 834. Not only does the District Court's opinion ostensibly permit an ex parte judicial determination with regard to parental fitness to be based upon hearsay evidence of alleged abusiveness, "unsupportiveness", or harm to the parents without affording notice and opportunity for the parents to be heard; but it also ignores the provisions of Ohio laws. See Ohio Rev. Code Section 2151.28 (allowing a neglect proceeding to be commenced by "any person alleging . . . that said child is without necessary and proper physical . . . care.") (emphasis added). Even more bothersome is the gratuitous assumption that a court can determine what is in a minor's "best interests" without parental input and a severance of the custodial right.

That the District Court could fail to see the parallel between parental bypass based on hearsay assertions, self-serving statements and questionable presumptions regarding parties not before the court, and the practices condemned in Alsager, supra, (on substantive grounds), and the recently decided Robert H., supra, evidences a lack of reasoned decision-making. In both Alsager and Robert H. the parents were "bypassed" and their custody terminated on the basis of one visit by a social worker; the District Court below allows "bypass" by hearsay and an ex parte order without even hearing from the parents.

The potential shortcomings of social work or child care professionals has been recognized by the Supreme Court in Smith, supra, as well as by other courts. See e.g., Robert H., supra, at 1389-1391; In re Rinker, supra, at 783-784. But the District Court uncritically accepted the testimony of plaintiffs' "experts," perhaps equally though unconsciously biased against parental involvement in the abortion decision for fear parents may harbor anti-abortion sentiments. See Baird v. Bellotti, supra, at 1001.

2. Parental "Bypass" Whether By Legislative Act or Judicial Decree Is Unconstitutional In The Absence of a Compelling State Interest.

As early as 1922 the Utah Supreme Court held that a parent could not be deprived of the custody of his or her child - even temporarily - without notice and an opportunity to be heard. Gitsch v. Wright, 61 Utah 175, 211 P. 705 (1922).

> "The question goes to the very foundation of judicial proceedings, without which the rights of litigants cannot be judicially determined. That every person has a right to his day in court and an opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion, much less to invoke the citation of authority.
>
> "The right of a party to the custody of a child is just as sacred as the right of property . . . The plaintiff was entitled to retain . . . custody until deprived thereof by due process of law. By what has been said, there is no intention on the part of the court to in any manner impugn the motives and intentions of the honorable judge, or defendant in the case. It is manifestly clear that he was inspired by humane motives, believing that it was for the best interest of the child to summarily place it in the custody of its mother. But, however good his intentions, the court had no power to make the order, which is challenging in this proceeding." 211 P. at 706.

The Supreme Court followed the basic premise of Gitsch in May, supra, and held that in personam jurisdiction over a parent was a jurisdictional prerequisite to severance of the familial bond. The basic premise underlying this solicitude for the rights of parents to nurture, educate, and care for their children is "the importance of the familial relationship, to the individuals and to the society (which) stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children, Yoder, supra, at 231-233, as well as from the fact of blood relationship." Smith, supra, at 844. Thus, at a minimum, parents have constitutional rights to:

> "(1) Physical possession of the child, which, in the case of a custodial parent includes the day-to-day care and companionship of the child.
>
> "(2) The right to discipline the child, which includes the right to inculcate the parent's moral and ethical standards.
>
> * * *
>
> "(7) The right to prevent an adoption of the child without the parent's consent." L.A.M. v. Alaska, 547 P 2d 827, 832-33 n.13 (1976).

In the case at bar, the parental "bypass" mandate of the District Court not only severs the substantive rights of the parents without a hearing on the basis of ex parte allegations, it also prevents them from fulfilling their role as parents at a time when their daughters may need them most.

3. Parental "Bypass" Is A Denial of Procedural Due Process.

In its opinion of August 22, 1979, the District Court held, in effect, that a Juvenile Court or other state body may determine the "best interests" of either a pregnant minor or her parents without parental notice. See Opinion of August 22, 1979 at 53. But the Court did not consider how such a rule could be squared with the Constitution and long-settled precedent precluding just such a rule.

There can be no question that consent to medical services is a part of a custody proceeding under Ohio law. Ohio Rev. Code. Section 2151.01 to 2151.54, and that the jurisdiction of the Juvenile Court will not even attach until the statutory notice is given. See Lewis v. Reed, 117 Ohio St. 152 (1927); In re Frinzl, 152 Ohio St. 164 (1949). Plaintiffs have argued that abortion is a medical procedure which should be accorded the same treatment as any other. The facts of this case clearly demonstrate that, although the clinics are financially interested in the outcome of a minor's decision-making process, they object to either parental input or judicial action which includes parents. It is inconceivable that the parents are to be excluded from a proceeding involving their child in favor of an arm of the state or a financially interested third party on the basis of ex parte statements, or pure assumptions.

Thus, the Supreme Court of Ohio has held that parents are entitled to the minimum of due process: notice and an opportunity to be heard, when their custody rights are in issue. Ohio Rev. Code Section 2151.28. Lewis, supra. See generally, State ex rel Heller v. Miller, 61 Ohio St. 2d 6 (1980) (indigent parents entitled to counsel and a transcript at state expense in involuntary terminations). Without such notice, jurisdiction of the court does not exist and any order issued is void ab initio. Lewis, supra; In re Corey, 61 N.E. 2d 892 (1945), Rarey v. Schmidt, 154 N.E. 914 (1926). Thus, in Re Flickenger, 33 O.L. Abs. 8, 20 Ohio Ops. 224 (1940), the Court held that the notice required by Ohio Rev. Code Section 2151.28 is an indispensable prerequisite to the exercise of Juvenile Court jurisdiction to make a commitment of a minor child, and in Shibler v. Cutshaw, 10 Ohio L. Abs. 338, it was held that custody may not be transferred without giving the guardian an opportunity to be heard.

Federal and state law is equally well-settled on the issue. May, supra. In Stanley v. Illinois, supra, the Supreme Court held that the father of an illegitimate child has a right to notice and full hearing regarding his fitness as a parent prior to the state's exercise of custody over the child. The Court stated:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference, and, absent a powerful countervailing interest, protection." 405 U.S. at 651.

Given that the District Court took no evidence regarding judicial proceedings or the need to make a "bypass" rule, it had absolutely no basis for assuming that a compelling state interest in parental exclusion exists which would permit parental exclusion.

> "Since the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic civil rights the state before depriving a parent of this interest must afford him adequate notice and an opportunity to be heard." (citations omitted). In re B.G., 11 Cal. 3d 679, 688-689, 114 Cal. Rptr. 444, 450, 523 P.2d 244, 250 (1974).

The requirements of the Due Process Clause require notice and an opportunity to be heard in proceedings affecting any important interest: parole revocation, Wolff v. McDonnell, 418 U.S. 539 (1978); termination of welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); pre-judgment wage garnishment, Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1968); driver licenses, Bell v. Burson, 402 U.S. 535 (1970); divorce, Boddie v. Connecticut, 401 U.S. 371 (1970). See also Perry v. Sinderman, 408 U.S. 593 (1971) (teachers contract). It is simply inconceivable that parental interests are deserving of less protection than a driver's license, and given the constitutional underpinnings of the Ohio Revised Code sections which were the basis of the District Court's invalidation of Section 1870.05, it is particularly distressing that the Court made no attempt to analyze the problems inherent in its rulings. See also Linn, supra.

FILED
1983 AUG -2 PM 12:12
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AKRON CENTER FOR REPRODUCTIVE)
HEALTH, INC., et al.,) Case No. C78-15
)
Plaintiffs) Judge: Conti
)
v.)
) MOTION FOR SEPARATE HEARING
CITY OF AKRON, et al.,) AND
) MEMORANDUM IN SUPPORT
Defendants)

MOTION

Now come Defendant-Intervenors, Patricia K. Black and Francois Seguin, M.D., and move the Court for a bifurcated hearing on the question of the liability of Defendant-Intervenors for attorney fees in this case and the question of the amount of fees to be awarded, all in accordance with the reasons set forth in their Memorandum In support that follows.

SEGEDY, UMBAUGH & SHARP

Alan G. Segedy

Alan G. Segedy
40 E. Mill Street (at Main)
Akron, Ohio 44308
(216) 253-5535

and

Robert A. Destro
6711 B. N. Washington Blvd.
Arlington, Virginia 22213
(703) 534-9079

Attorneys for Defendant-Intervenors
Patricia K. Black and
Francois Seguin, M.D.

MEMORANDUM IN SUPPORT

Plaintiffs recently filed a motion herein denominated as a "Renewal of Motion for Award of Attorneys' Fees" in which Plaintiffs apparently seek an award of attorney fees against Defendant-Intervenors as well as the Defendants, City of Akron, et al. Plaintiffs have requested oral hearing on their motion on or before August 26, 1983, but have not yet submitted to counsel for Defendant-Intervenors a supplementary memorandum of law or supplementary affidavits as referred to in their motion.

Defendant-Invervenors, Patricia K. Black and Francois Seguin, M.D., were not sued as Defendants in this cause by Plaintiffs but had been permitted to intervene in their capacity as parents of minor daughters of child-bearing age, asserting their own constitutional and civil rights as parents.

Plaintiffs' motion presents a crucial threshold question as to the liability of Mrs. Black and Dr. Seguin as intervening defendants. That question should first be resolved before addressing the question of what amount of attorney fees Defendant-Intervenors could be held liable for if liability exists.

Furthermore, the hearing date requested by Plaintiffs of on or before August 26, 1983 simply does not permit Defendant-Intervenors sufficient time in which to adequately defend Plaintiffs' claim for attorney fees as against them. Plaintiffs' motion presents complex questions as to what issues Plaintiffs had not prevailed on and the allocation of attorney time to those issues, as well as provisions of the challenged ordinance which were in fact upheld. Resolution of those and other complex questions will require extensive discovery on the part of Defendant-Intervenors which cannot possibly be completed within the time requested by Plaintiffs.

In order to narrow the issues as much as possible and to save this Court and the parties the time and expense involved in litigating the questions relating to the amount of attorney fees for which Defendant-Intervenors could be liable, whereas Defendant-Intervenors contend that as a matter of law they cannot held so be liable, Defendant-Intervenors submit to the Court that the question of their liability be first separately resolved without addressing the question of amounts.

Therefore, Defendant-Intervenors request that the Court:

1. Set Plaintiffs' motion for hearing only as to the question of whether attorney fees are assessable in this case as

against Defendant-Intervenors;

2. Defer any questions as to the amount of attorney fees to be awarded until such time as the threshold question of Defendant-Intervenors liability has been resolved and until a reasonable time has elapsed for discovery if this Court should find Defendant-Intervenors so liable.

Respectfully submitted,

Alan G. Segedy

Alan G. Segedy
Attorney for Defendant-Intervenors

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Separate Hearing and Memorandum in Support was served by regular U.S. Mail to Stephan Landsman, Attorney for Plaintiffs, Cleveland-Marshall College of Law, Cleveland State University, Cleveland, Ohio 44115 and Edward J. Riegler, Director of Law, City of Akron, 304 Municipal Building, Akron, Ohio 44308 this 2nd day of August, 1983.

Alan G. Segedy

Alan G. Segedy
Attorney for Defendant-Intervenors

DOWD, J.

FILED
11 PM 2:32
[illegible] COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. et al.,
Plaintiff
-v-
CITY OF AKRON, et al.
Defendant

CASE NO. C78-155-A

JUDGE DAVID D. DOWD, JR.

O R D E R

Before the Court is the motion of defendant-intervenors Francois Seguin and Patricia K. Black seeking alteration or amendment of this Court's June 18, 1984, order finding defendant-intervenors subject to an award of attorneys fees.

Defendant-intervenors rely on Fed. R. Civ. P. 59(e) as the procedural basis for their motion. Rule 59(e), however, applies only to judgments. The Court's June 18, 1984, order did not enter judgment for or against any party. Under this analysis, the court concludes that the motion is premature. If at some future date, the Court enters judgment against defendant-intervenors for attorneys fees, defendant-intervenors may then move to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e).

Accordingly, the motion to alter or amend is denied.

IT IS SO ORDERED.

David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

STATEMENTS OF HON. FRANCIS X. BELLOTTI, ATTORNEY GENERAL, MASSACHUSETTS; HON. STEVEN CLARK, ATTORNEY GENERAL, ARKANSAS; AND HON. DAVID L. WILKINSON, ATTORNEY GENERAL, UTAH, REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. BELLOTTI. Thank you very much, Senator, we will try and be brief, even though we are political people who sometimes have problems with brevity.

I am going to try to give you a brief overview of our position. This is a long-time National Association of Attorneys General issue, something we have been very concerned about in a very nonpartisan or bipartisan sense. Senator, you know that General Wilkinson and I are at different ends of the philosophical spectrum sometimes, but on this issue we are all together.

Senator HATCH. That's always wonderful to see this kind of compatibility

Senator DECONCINI. Yes, it is. [Laughter]

Mr. BELLOTTI. I am especially grateful for the opportunity of sharing with you our concerns about attorney's fee awards, particularly under 42 United States Code 1988, and my thoughts about legislative reform in this area.

I speak not only from my own personal experience, but also with my fellow attorneys general here today on behalf of our national association.

At the outset—I think this is very important—I want to emphasize that I am not here today to in any way undermine the enforcement of civil rights or to weaken the opportunity our citizens should have to obtain competent counsel.

The association has stated emphatically that whatever is done in the attorney's fee area, no change of law should diminish in any way, in the slightest, the basic and fundamental civil rights enjoyed by the individual citizens of the States and of this Nation.

In a personal sense, I am very proud of my record in support of vigorous enforcement of civil rights in my State, and I will match that record against any. But as State attorneys general we must protect not only civil rights but tax dollars. I reject the argument that commitment to the civil rights of our citizens is to be measured by the taxpayers' generosity to their lawyers:

I support the basic principle that a reasonable attorney's fee should be paid to a party who succeeds in vindicating his or her civil rights.

The difficulty is the lack of specific guidance from Congress; it has allowed practice under section 1988 to depart from the original intent of the Congress.

In recent years two developments have combined to make attorney-fee awards a problem of great importance to State and local government. First is the phenomenal expansion of the types of cases in which awards of attorney's fees are authorized, particularly since the Supreme Court decision, *Maine* v. *Thiboutot* in 1980. Virtually any lawsuit against a State agency or official brought in any court, State or Federal, no matter how remote from traditional civil rights, exposes the taxpayers to the payment of the plaintiff's lawyer's fees. That case went far beyond the original intent to handle civil rights cases.

The second major factor is the rapid growth in the size of the awards the courts are making. Under current law, attorneys are entitled to claim reimbursement based on market rates, not on what their costs were. Thus, low-overhead storefront lawyers can claim and receive rates based on Wall Street standards.

The impact on the States is laid out in our report to Congress, which is a very comprehensive writing that will delineate all of the issues that we find and all of the recommendations that we make. It is my intention to submit that report and make it a part of the record because I believe that report is devastating. For example, currently the State of Washington has $8 million in attorney-fee claims pending; the State of Florida paid nearly $2.6 million in 1983 alone; and the fee awards in recent years in Florida have equaled roughly 80 percent of all civil rights judgments against the State of Florida. The State of Kansas has paid more in attorney-fee awards during the past 3 years than it has for all other settlements and judgments of any kind during that same period.

In my State of Massachusetts we are now facing a claim of over $2 million in attorney's fees in one case alone.

In short, under the current law, the sky is the limit.

The current law has also generated side effects as well. It is now far more rewarding for plaintiffs' lawyers to sue rather than to settle matters out of court. And, once in court, there is a strong incentive to prolong litigation rather than seek reasonable settlements. We have also found the threat of budget-breaking attorney-fee awards is a strong deterrent to defense of close cases that should be tried.

Finally, since attorneys are also reimbursed for the time they spend litigating their fee claims, the act which was designed to promote the enforcement of civil rights has instead led to an ever-increasing number of socially useless suits over nothing but the amount of fees to be awarded.

Legislative reform is clearly in order. The National Association of Attorneys General, a group as politically and geographically diverse as the Congress itself, has reported without dissent that the current lack of statutory standards governing the application for and the adjudication of fee awards has encouraged unreasonably high requests, stymied settlement efforts, forced cases into litigation, and permitted inconsistent, excessive, and ever-escalating fee awards.

I am pleased and encouraged, as we all are, that many of the recommendations that the State attorneys general have made to address these problems are incorporated in S. 2802.

In general, we strongly support the bill's specific standards; they will enable both sides to understand better the rules of the game and encourage out-of-court settlement. For those claims that must be decided in court, the bill will have judges apply greater moderation and consistency in fee awards.

In particular, we support the provisions of the bill which would prohibit bonuses and multipliers, apportion the amount of fee to the degree of success actually attained by the lawsuit, and cap attorney's fees at $75 per hour.

Bonuses and multipliers are nothing more than tips which are added on to the figure which is obtained from multiplying a reasonable hourly fee times a reasonable number of hours spent. There should be no place for such "tips" over and above the reasonable fee which taxpayers already are obliged to pay.

Similarly, fees should not be paid to reimburse work done on parts of a case which were rejected or which did not lead to relief for the plaintiff.

Finally, $75 an hour is a reasonable level to attract competent counsel to civil rights cases without unduly burdening State and local taxpayers. The reasonableness of this rate is obvious, since Congress has capped fees to be paid by Federal taxpayers at the $75 level.

One recommendation of the State attorneys general is not included and did not find expression in the bill as it now stands, but is one which we feel is important. As you know, Congress has wisely provided that people in litigation with the Federal Government may obtain an award of attorney's fees if they can show that the Government's position was not substantially justified or advanced in good faith. In suits against the States, no such qualification exists, and parties may obtain attorney's fees if they obtain any benefit from the lawsuit no matter how justified the State's position might have been. In some cases, States have been required to pay attorney's fees in cases where their liability stemmed solely from their faithful adherence to Federal statutes and regulations. We think there is no principled basis for the different treatment of the Federal and State governments. We would like to see the same standards for awards against State and local defendants whose legal positions are substantially justified as are now applied to Federal defendants.

I would like to close my remarks by reiterating what I have said earlier. As State attorneys general, we have a duty to protect both civil rights and tax dollars. We believe firmly that we can do both if our recommendations are adopted

I thank you for this opportunity to speak to you on this issue. We will distribute to you the document I referred to earlier, entitled, "Civil Rights Attorney's Fees Awards Act of 1976, Report to Congress."

[The following was received for the record:]

REPORT
TO
CONGRESS

Civil Rights
Attorney's Fees Awards
Act of 1976

National Association
of
Attorneys General

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
HALL OF THE STATES
444 NORTH CAPITOL STREET
WASHINGTON, D.C. 20001
(202) 628-0435

C. RAYMOND MARVIN
Executive Director
General Counsel

PRESIDENT
MIKE GREELY
Attorney General of Montana

PRESIDENT-ELECT
FRANCIS X. BELLOTTI
Attorney General of Massachusetts

VICE PRESIDENT
ROBERT T. STEPHAN
Attorney General of Kansas

IMMEDIATE PAST PRESIDENT
WILLIAM J. GUSTE, JR
Attorney General of Louisiana

February 3, 1984

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Senator Strom Thurmond
President Pro-Tempore of the Senate

Dear Speaker O'Neill and Senator Thurmond:

This Report is forwarded to you and your colleagues for use in your deliberations and debates of the issues raised by the federal courts' interpretation and application of the Civil Rights Attorney's Fees Awards Act of 1976. As documented herein, the serious problems that have emerged threaten to undermine the laudable purposes of the Act and violate the original intent of Congress.

This is a comprehensive overview of the experiences of the states with the Act; those experiences naturally vary in nature and intensity from judicial circuit to judicial circuit. This Report reflects a very broad consensus developed from that collective experience across as politically and geographically diverse a group as the Congress itself. Obviously the views of the Attorneys General may vary on certain points.

Whatever you may determine should be done, we are concerned that no change of law should diminish in any way the basic and fundamental civil rights which protect the individual citizens of the States and this Nation. We believe that implementation of the recommendations contained herein will further secure those rights and enhance their protection in the federal courts.

The Association wishes to call attention to the contribution of the offices of Attorneys General Kenneth O. Eikenberry of Washington and Francis X. Bellotti of Massachusetts for the research and writing of this Report. Senior Assistant Attorneys General Tom Carr of Washington and Carl Valvo and Judith Yogman of Massachusetts whose work has produced this Report deserve special recognition and appreciation.

No report in an area of law developing as rapidly in as many jurisdictions as this can be entirely current. We ask all readers to inform us of pertinent information and of their views. We hope you will find this Report useful and are ready to assist you in any way possible in your work.

Sincerely and respectfully,

Raymond Marvin

C. Raymond Marvin

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE, BOSTON 02108

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

January 27, 1984

C. Raymond Marvin
Executive Director
General Counsel
National Association of Attorneys General
Hall of the States
444 North Capitol Street
Washington, D.C. 20001

Dear Mr. Marvin:

In cooperation with Attorney General Kenneth O. Eikenberry, I am pleased to forward to you for distribution to the United States Congress a report entitled "Problems Arising From Implementation of the Civil Rights Attorney's Fee Award Act of 1976 and Recommendations For Change".

This report seeks to focus the attention of Congress on serious problems that have developed since passage of the Civil Rights Attorney Fees Act. My collegues and I believe these problems and their solution merit the early attention of the Congress.

Sincerely,

Francis X Bellotti

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

OFFICE OF THE
ATTORNEY GENERAL

February, 1984

Mr. Ray Marvin
Executive Director
National Association of
Attorneys General
Hall of the States, Suite 403
444 North Capitol Street
Washington, D.C. 20001

Dear Mr. Marvin:

In cooperation with Attorney General Francis Bellotti of Massachusetts, I am pleased to forward the following report to the United States Congress on "Problems Arising from the Implementation of the Civil Rights Attorneys Fees Awards Act of 1976 and Recommendations for Change".

The report focuses on practices that we believe Congress did not intend, and on serious problems that have developed since passage of the act. My colleagues and I believe these concerns are so serious as to merit the early attention of the congress.

Very truly yours,

Ken Eikenberry

KEN EIKENBERRY
Attorney General

KE:jh

Ken Eikenberry Attorney General
Temple of Justice, Olympia, Washington 98504

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

REPORT TO THE CONGRESS

Civil Rights Attorney's Fees Awards Act of 1976

"In any action or proceeding to enforce a provision of [several U.S. Code sections, including 42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988

February 1984

TABLE OF CONTENTS

Page

TABLE OF CASES iii

FOREWORD xi

RESOLUTION xv

INTRODUCTION 1

A. Purpose of the Civil Rights Attorney's Fees Awards Act 1

B. Good Intentions Gone Awry: A Need For Legislative Action 2

FINDINGS OF THE ASSOCIATION 4

RECOMMENDATIONS OF THE ASSOCIATION 6

DISCUSSION OF FINDINGS AND RECOMMENDATIONS 8

Finding No. 1 8
Recommendation No. 1 10

Finding No. 2 11
Recommendation No. 2 14

Finding No. 3 15
Recommendation No. 3 18

Finding No. 4 19
Recommendation No. 4 21

Finding No. 5 22
Recommendation No. 5 26

Finding No. 6 27
Recommendation No. 6 30

Finding No. 7 31
Recommendation No. 7 40

Finding No. 8 41
Recommendation No. 8 46

Finding No. 9 47
Recommendation No. 9 49

CONCLUSION 50

ABOUT THE ASSOCIATION 51

TABLE OF CASES

Page

Alpine Pharmacy, Inc. v. Charles Pfizer & Co.,
481 F.2d 1045 (2d Cir.), *cert. denied*,
414 U.S. 1092 (1973) 35

Alsager v. District Court,
447 F. Supp. 572 (S.D. Iowa 1977).................... 42, 45

Alyeska Pipeline Service Co. v. Wilderness
Society, 421 U.S. 240 (1975)............................ 1

Anderson v. Morris,
658 F.2d 246 (4th Cir. 1981)............................ 28

Armstrong v. Reed,
462 F. Supp. 496 (N.D. Miss. 1978)...................... 16

Avalon Cinema Corp. v. Thompson,
689 F.2d 137 (8th Cir. 1982)............................ 28

Bills v. Hodges,
628 F.2d 844 (4th Cir. 1980)............................ 24

Bly v. McLeod, 605 F.2d 134
(4th Cir. 1979), *cert. denied*, 445,
U.S. 928 (1980)... 17

Bolden v. Pennsylvania State Police,
491 F. Supp. 958 (E.D. Pa. 1980) 31

Bond v. Stanton, 630 F.2d
1231 (7th Cir. 1980).................................... 24

Brewster v. Dukakis,
544 F. Supp. 1069 (D. Mass. 1982) 35

Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983) 49

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978)..................................... 36

Cicero v. Olgiati,
473 F. Supp. 653 (S.D.N.Y. 1979)........................ 16

City of Detroit v. Grinnell Corp.,
495 F. 2d 448 (2d Cir. 1974) 32, 33, 34, 37

Coalition for Basic Human Needs v. King,
691 F.2d 597 (1st Cir. 1982) 16, 24

Concerned Democrats v. Reno, 689 F.2d 1211
(5th Cir.) *rev'g* 493 F. Supp. 660
(S.D. Fla. (1980) 24

Connor v. Winters, 519 F. Supp. 1337
(S.D. Miss. 1981) 25

Coop v. City of South Bend,
635 F.2d 652 (7th Cir. 1980) 24

Copeland v. Marshall, 594 F.2d 244
(D.C. Cir. 1978) (Copeland I) 42

Copeland v. Marshall, 641 F.2d 880
(D.C. Cir. 1980)
(Copeland III) 28, 35, 38, 42, 43, 44, 45

Copper Liquor, Inc. v. Adolph Coors Co.,
684 F.2d 1087 (5th Cir. 1982) 28

Crosby v. Bowling, 683 F.2d 1068
(7th Cir. 1982) 24

Dayan v. Board of Regents, 620 F.2d 107
(5th Cir. 1980) 15

DeMier v. Gondles,
676 F.2d 92 (4th Cir. 1982) 16

Dennis v. Chang, 611 F.2d 1302
(9th Cir. 1980) 41

Ellwest Stereo Theatre, Inc. v. Jackson,
653 F.2d 954 (5th Cir. 1981) 24

Entertainment Concepts, Inc. v. Maciejewski,
631 F.2d 497 (7th Cir. 1980),
cert. denied, 450 U.S. 919 (1981) 24

Environmental Defense Fund, Inc. v. EPA,
672 F.2d 42 (D.C. Cir. 1982) 10

Foster v. Gloucester County Board of Chosen Freeholders, 465 F. Supp. 293 (D.N.J. 1978) 34

Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983) 49

Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980) 28, 36

Furtado v. Bishop, 84 F.R.D. 671 (D. Mass. 1979), *rev'd*, 635 F.2d 915 (1st Cir. 1980) 36

Glover v. Johnson, 531 F. Supp. 1036 (E.D. Mich. 1982) 42, 44

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 43

Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983) 32

Greenspan v. Automobile Club, 536 F. Supp. 411 (E.D. Mich. 1982) 42

Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980) 49

Grendel's Den v. Larkin, No 77-3418-T (D. Mass.) 14, 41

Hagans v. Lavine, 415 U.S. 528 (1974) 12, 13

Hanrahan v. Hampton, 446 U.S. 754 (1980) 8

Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979) 24

Haygood v. Younger, No. S-75-738LKK (E.D. Cal. 1983) 19

Hensley v. Eckerhart, 103 S. Ct. 1933 (1983) 3, 9, 10, 20, 29, 39

Holley v. Lavine, 605 F.2d 639 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980) 24

Hughes v. Repko, 578 F.2d 483
(3rd Cir. 1978) 37

Hutchinson v. William C. Barry, Inc.,
50 F. Supp. 292 (D. Mass. 1943). 22

Hutto v. Finney, 437 U.S. 678 (1978). 24, 33

Institutionalized Juveniles v. Secretary of
Public Welfare, 568 F. Supp 1020
(E.D. Pa. 1983) 16

Johnson v. Georgia Highway Express,
488 F.2d 714 (5th Cir. 1974). 27, 45

Johnson v. Mississippi, 606 F.2d 635
(5th Cir. 1979). 24

Johnson v. Snyder 470 F. Supp. 972
(N.D. Ohio 1979) 41

Jones v. Federated Department Stores, Inc.
527 F. Supp. 912 (S.D. Ohio 1981). 49

Jordan v. United States Department of Justice,
672 F.2d 514 (D.C. Cir. 1982). 10

Kenley v. Young, 455 U.S. 961 (1982). 17

Lindy Brothers Builders, Inc. v. American
Radiator & Standard Corp., 487 F.2d 161
(3rd Cir. 1973) (Lindy I). 27, 32

Lindy Brothers Builders, Inc. v. American
Radiator & Standard Corp., 540 F.2d 102
(3rd Cir. 1976) (Lindy II) 32

Louisville Black Police Officers Organization, Inc.
v. City of Louisville, 700 F.2d 268
(6th Cir. 1983) 32

Love v. Mayor, 620 F.2d 235
(10th Cir. 1980). 24

Lund v. Affleck, 587 F.2d 75
(1st Cir. 1978) 41

Maher v. Gagne, 448 U.S. 122 (1980). 8

Maine v. Thiboutot, 448 U.S. 1 (1980). 2, 8, 11

Manhart v. City of Los Angeles, 652 F.2d 904
(9th Cir. 1981), *vacated and remanded on other grounds*, 103 S. Ct. 2420
(1983) 32

Mills v. Eltra Corp, 663 F.2d 760
(7th Cir. 1981). 9

Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981). 19

Morrison v. Ayoob, 627 F.2d 669
(3rd Cir. 1980), *cert. denied*, 449,
U.S. 1102 (1981) 24

NAACP v. Wilmington Medical Center, Inc.,
689 F.2d 1161 (3rd Cir. 1982) *cert. denied*,
103 S. Ct. 1499 (1983) 15

Nadeau v. Helgemoe, 581 F.2d 275
(1st Cir. 1978). 24

National Association of Concerned Veterans
v. Secretary of Defense, 675 F.2d 1319
(D.C. Cir. 1982) 10, 34, 46

New York Association for Retarded Citizens
v. Carey, 711 F.2d 1136
(2d Cir. 1983) 10

New York Gaslight Club v. Carey,
447 U.S. 54 (1980). 8

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968). 22

Northcross v. Board of Education,
611 F.2d 624, 638 (6th Cir. 1979),
cert. denied, 447 U.S. 911 (1980) 28, 34

NYSARC v. Carey, 711 F.2d 1136
(2d Cir. 1983) 38, 42, 44, 45

Oliver v. Kalamazoo Board of Education,
576 F.2d 714 (6th Cir. 1978) 34

Page v. Preisser, 468 F. Supp. 399
(S.D. Iowa 1979) 42, 45

Palmigiano v. Garrahy, 616 F.2d 598
(1st Cir.), *cert. denied*,
449 U.S. 839 (1980) 44

Pennsylvania v. O'Neill, 431 F. Supp. 700
(E.D. Pa. 1977), *aff'd mem.*,
573 F.2d 1301 (3rd Cir. 1978) 41

Pickett v. Milam, 579 F.2d 1118
(8th Cir. 1978) 24

Population Services International v. Carey,
476 F. Supp. 4 (S.D.N.Y. 1979) 31

Prandini v. National Tea Co., 557 F.2d 1015
(3rd Cir. 1977) 32, 37

Price v. Pelka, 690 F.2d 98 (6th Cir. 1982) 25

Pugh v. Rainwater, 465 F. Supp 41
(S.D. Fla. 1979) 41

Rajender v. University of Minnesota,
546 F. Supp. 158 (D. Minn. 1982) 32

Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 42

Rivera v. City of Riverside, 679 F.2d 795
(9th Cir. 1982) 19

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 8

Rodriquez v. Taylor, 569 F.2d 1231
(3rd Cir. 1977), *cert. denied*,
436 U.S. 913 (1978) 38, 41, 45

Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979),
cert. denied, 448 U.S. 906 (1980) 15

Ruckelshaus v. Sierra Club,
103 S. Ct. 3274 (1983) 36

Scheriff v. Beck, 452 F. Supp. 1254
(D. Colo. 1978). 49

Seals v. Quarterly County Court, 562 F.2d 390
(6th Cir. 1977). 13

Seattle School District No. 1 v. Washington
633 F.2d 1338 (9th Cir. 1980), *aff'd,*
102 S. Ct. 3187 (1982) 24

Skoda v. Fontani, 646 F.2d 1193
(7th Cir. 1981). 19, 24

Stenson v. Blum, No. 81-7385 (2d Cir.),
cert. granted, 103 S. Ct. 2426
(1983) 10, 32, 41

Stratos v. Department of Public Welfare,
387 Mass. 312 (1982). 12

Supreme Court of Virginia v. Consumers Union,
446 U.S. 719 (1980). 8, 24

Swicker v. William Armstrong & Sons Inc.,
484 F. Supp. 762 (E.D. Pa. 1980) 34

Vecchione v. Wohlgemuth, 481 F. Supp. 776
(E.D. Pa. 1979) 31, 37

Vermont Low Income Advocacy Council v.Usery,
546 F.2d 509
(2nd Cir. 1976) 18, 26

Waters v. Heublein, Inc., 485 F. Supp. 110
(N.D. Cal. 1979) 49

Wells v. Hutchinson, 499 F. Supp. 174
(E.D. Tex. 1980) 32

West v. Redman, 530 F. Supp. 546
(D. Del. 1982). 32

Young v. Kenley, 641 F.2d 192
(4th Cir. 1981). 17

As the foregoing comments suggest, courts and commentators alike have become critical of attorney's fees litigation. Since passage of the Civil Rights Attorney's Fees Awards Act of 1976, one constant voice expressing concern has been that of the National Association of Attorneys General, which has continuously monitored the implementation and effect of the Act. On the basis of its collective experience, the Association has become increasingly concerned that the Act, as interpreted and applied by the courts, is operating contrary to its original purpose. Rather than simply facilitating access to the courts for disadvantaged victims of civil rights violations, a purpose that the Association wholeheartedly endorses, the Act has had the unintended effects of encouraging frivolous non-civil rights claims, deterring settlement of meritorious claims, awarding fees to plaintiffs who do not actually prevail, conferring unreasonable "windfall" fees on plaintiffs' counsel, draining public treasuries, and fostering an avalanche of litigation on attorney's fees that threatens to bury the underlying civil rights claims that the Act was intended to vindicate.

In this report, the Association outlines and documents these adverse and unintended applications of the Act and recommends the enactment of statutory standards that would restore the Act to its original purpose, provide needed guidance to the courts and the bar, and mitigate the possibility of abuse. In particular, the Association recommends that the Act be amended to apply solely to true civil rights cases; to define "prevailing party" in a realistic manner; to restore and guide judicial discretion to award or deny fees; to provide workable standards for computing a "reasonable" fee; to impose a ceiling on the hourly rates at which attorneys may be compensated; to prohibit the award of "bonuses" in excess of reasonable compensation for time reasonably spent by prevailing counsel; and to provide additional incentives for settlement.

This report begins with an outline of the Association's findings and recommendations, which is followed by a discussion and analysis of the basis for each finding and recommendation. After documenting the magnitude of the problem created by the lack of coherent and workable standards (Finding and Recommendation No.1), the report makes specific findings and recommendations concerning the scope of the Act (Finding and Recommendation No. 2), the standard for determining a party's eligibility for fees (Findings and Recommendations Nos. 3, 4, and 5), and the standard for calculating a "reasonable" attorney's fee (Findings and Recommendations Nos. 6, 7, and 8). Finally, the report discusses the adverse impact of the Act on the process of dispute resolution, both in and out of court, and recommends how that problem could be alleviated by legislative reform (Finding and Recommendation No. 9).

FOREWORD

. . . [O]ne of the least socially productive types of litigation imaginable [is] appeals from awards of attorney's fees . . .

. . . .

Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake.

> Hensley v. Eckerhart, 103 S. Ct. 1933, 1944, 1951 (1983) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

The only truly consistent thread that runs through federal court decisions on attorney's fees is their lack of consistency.

. . . .

[I]nordinately high fee awards in some cases, and the absence of a coherent rationale for justifiably large awards in other cases, have lent support to the sentiments of the Italian proverb that "a lawsuit is a fruit tree planted in a lawyer's garden."

> Berger, Court Awarded Attorney's Fees: What is "Reasonable"?, 126 Pa. L. Rev. 281, 292 (1977).

The various recommendations contained in this report are not intended to discourage or inhibit victims of civil rights violations from redressing their grievances through litigation. Rather, the intent of these recommendations is to turn the focus of civil rights litigation away from fee disputes and return it to the aggrieved parties whose rights the Act was intended to vindicate. This report does not take issue with the Congressional determination that a public entity that violates a person's civil rights should be burdened with having to pay attorney's fees necessary to prove such a violation. However, the process for awarding fees, the amounts of fees awarded, and the underlying claims must be viewed in light of the purposes of the original Act. As indicated by the findings contained in this report, the Act is operating contrary to its original purposes. Legislative action, along the lines recommended in this report, is urgently needed.

RESOLUTION

In plenary session on June 25, 1983, the Association adopted the following resolution:

WHEREAS, litigation under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is expanding at an alarming rate, with further expansion in the future a near certainty; and

WHEREAS, lack of meaningful standards to determine what is a "reasonable" attorney's fee in any given case consistently results in exorbitant court-ordered fee awards paid from public treasuries of state and local governments and creates additional problems for public defendants; and

WHEREAS, cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of collateral attorney's fees requests when, in fact, they have not prevailed in any meaningful sense on the merits of their claim; and

WHEREAS, the reported Fees Act opinions so narrowly circumscribe the ability of lower courts to determine when special circumstances exist that justify outright denial of requested fees that the discretion expressly contemplated by the Fees Act itself can rarely be exercised at all; and

WHEREAS, a special subcommittee chaired by Attorney General Kenneth Eikenberry has studied abuses under 42 U.S.C. § 1988 and has compiled its findings into [this] Report;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General:

1. Urges the Congress to adopt legislation that will eliminate these and other related problems that have resulted from abuses under 42 U.S.C. § 1988;

2. Commends Attorney General Eikenberry and members of the Subcommittee for the diligent work on this matter and adopts the Report as part of the Association's policy position; and

3. Authorizes its General Counsel to transmit these views to the appropriate members of the Administration and Congress.

INTRODUCTION

A. Purpose of the Civil Rights Attorney's Fees Award Act

The Civil Rights Attorney's Fees Awards Act of 1976 was passed in direct response to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), which held that federal courts do not have the power to award attorney's fees to a prevailing party without express statutory authorization.[1/] Prior to Alyeska, federal courts had been awarding attorney's fees to the prevailing party in civil rights cases on the theory that, in bringing such cases, plaintiffs serve in the capacity of "private attorneys general," seeking to vindicate constitutional rights, not for themselves alone, but also for the benefit of others similarly situated. By holding that the federal courts lack authority to award fees under such circumstances, Alyeska "created anomalous gaps in our civil rights laws," which the Act was intended to fill.[2/]

The Act was thus intended to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs acting in the role of private attorneys general, by affording successful civil rights plaintiffs "the opportunity to recover what it costs them to vindicate these rights in court."[3/] Such a measure was viewed as desirable in order to enforce "major civil rights laws,"[4/] protecting the most "basic" and "fundamental" civil rights.[5/]

As a "narrowly drawn" response to Alyeska,[6/] the Act was not intended as a wholesale abrogation of the "American Rule" that each

---

1/ Id. at 269.

2/ S. Rep. No. 1011, 94th Cong., 2d Sess. 1,4 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908.

3/ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976).

4/ 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Abourezk), 35,116 (remarks of Rep. Anderson).

5/ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney); 122 Cong. Rec. 31,472, 33,314 (remarks of Sen. Kennedy), 35,115 (remarks of Rep. Anderson), 35,124 (remarks of Rep. Railsback), 35,126 (remarks of Rep. Fish), 35,127 (remarks of Rep. Holtzman) (1976).

6/ 122 Cong. Rec. 35,126 (remarks of Rep. Kastenmeier) (1976).

party must bear its own litigation costs. Rather, it was viewed by its proponents as "only a first step and a rather limited and cautious one."[7] The proponents of the Act repeatedly emphasized its limited purpose by reiterating that the Act was not intended to "aid [ ] lawyers,"[8] encourage meritless litigation,[9] or provide "windfalls" to prevailing counsel.[10] Rather, Congress stressed the Act's relatively moderate approach of authorizing courts, in their discretion, to award a "reasonable" attorney's fee to prevailing parties in certain civil rights cases, in contrast to that of more liberal statutes providing for mandatory fee awards or awards to non-prevailing parties.[11]

B. Good Intentions Gone Awry: A Need for Legislative Action

As will be shown in this report, the good intentions of Congress outlined above have not been realized. Rather than simply facilitate the vindication of meritorious civil rights claims, as Congress intended, the Act has operated to foster a flood of litigation on the entitlement to and amount of attorney's fees. Rarely has a federal statute had the immediate and explosive impact on litigation involving state officials as has this Act. Particularly after Maine v. Thiboutot, 488 U.S. 1 (1980),[12] it has become routine for all governmental litigation—from the most complex class actions for institutional reform to the most commonplace complaints for state judicial review of administrative decisions—to include requests for attorney's fees under the Act. Not surprisingly, the soaring number of attorney's fees claims is reflected in the burgeoning amount of litigation engendered by the Act itself.

---

[7] Id.

[8] 122 Cong Rec. 33,314 (remarks of Sen. Kennedy), 35,127 (remarks of Rep. Jordan) ("This is not a food-stamp bill for lawyers. It is not going to work that way."), 35,128 (remarks of Rep. Sieberling) ("not a lawyers' bill") (1976).

[9] 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney) ("Bill would do nothing to encourage frivolous or bad faith litigation"); 122 Cong. Rec. 35,127 (remarks of Rep. Jordan), 35,128 (remarks of Rep. Sieberling) (1976); H.R. Rep. at 7.

[10] H.R. Rep. at 9; S. Rep. at 6.

[11] H.R. Rep. at 6-9; 122 Cong. Rec. 35,115-17 (remarks of Rep. Anderson and Rep. Railsback), 35,122-23 (remarks of Rep. Sieberline) (1976).

[12] In that case, the Supreme Court construed 42 U.S.C. SS 1983 and 1988 to apply to actions to enforce rights secured by any federal statute and ruled that such actions could be brought in state as well as federal courts.

These developments are both undesirable and unnecessary. One can hardly conceive of a less socially valuable use of resources than fees litigation. [13/] State and federal taxpayers are now routinely subjected to the spectacle of publicly-funded counsel making claims for fees to be paid by publicly-funded agencies, defended by publicly-funded attorneys general, and decided by publicly-funded courts. While no single participant in these exercises is exclusively responsible, it is the Association's firm belief that the lack of statutory standards governing the application for and adjudication of fee awards has unnecessarily encouraged unreasonably high requests, stymied settlement efforts, forced these matters into litigation, and permitted inconsistent, excessive, and ever-escalating fee awards. This chain of events has caused an outcry by the bench, the bar, and the tax-paying public for legislative reform.

The Association therefore urges the Congress to enact clear standards of eligibility for and computation of fee awards under the Act, in accordance with the recommendations contained in this report. Provision for such standards would render the application of the Act more consistent and, hence, more reasonable, to the mutual benefit of civil rights plaintiffs, state taxpayers, and the judiciary. Greater certainty would promote settlement, reduce fee litigation, and thereby permit counsel and the courts to devote more attention to substantive matters.

The Association wishes to emphasize that it endorses the salutary purpose of the Act and is committed to the Act's concept of reasonable fees to prevailing parties in civil rights cases. The recommendations contained in this report are intended to further the Act's original purpose while eliminating its unintended and undesirable side-effects.

[13/] See Hensley v. Eckerhart, 103 S. Ct. 1933, 1944 (1983) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part) (referring to fees litigation as "one of the least socially productive types of litigation imaginable").

FINDINGS OF THE ASSOCIATION

FINDING NO. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

FINDING NO. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

FINDING NO. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

FINDING NO. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

FINDING NO. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

FINDING NO. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

FINDING NO. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

FINDING NO. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual cost of the litigation.

FINDING NO. 9: The Fees Act affects the process of legal dispute resolution in a way that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

C. making it less desirable, once litigation is underway, for public defendants to alter challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

RECOMMENDATIONS OF THE ASSOCIATION

RECOMMENDATON NO. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.

RECOMMENDATION NO. 2: The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.

RECOMMENDATION NO. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.

RECOMMENDATION NO. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fee awards to the degree of success actually attained by the prevailing party.

RECOMMENDATION NO. 5: The Congress should amend the Fees Act to provide expressly that a court may deny fees where, in the court's view, denial is appropriate, including, but not limited to, cases in which the court determines:

A. that the defendant's position was substantially justified or advanced in good faith; or

B. that an award of fees would not further the substantive purposes of the Act.

RECOMMENDATION NO. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of $75 per hour.

RECOMMENDATION NO. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

RECOMMENDATION NO. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.

RECOMMENDATION NO. 9: The Congress should amend the Fees Act to provide that the court shall deny attorney's fees to a prevailing party, where it determines:

A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or

B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.

DISCUSSION OF FINDINGS AND RECOMMENDATIONS

Finding No. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

Since the inception of the Act in 1976, litigation on eligibility for and computation of attorney's fees has mushroomed. The number of reported cases involving attorney's fees is tremendous. West's annotations to 42 U.S.C. § 1988 now fill 179 closely printed pages.[14/] A computer search for cases arising under § 1988 revealed almost 3,000 federal and state decisions as of December 1983. The advance sheets routinely report numerous attorney's fees cases each week; and the Supreme Court decides fee cases every term, while declining to review many more. Indeed, in just one month in 1980, the Court rendered six major attorney's fees decisions.[15/]

This explosion of fee litigation has engendered numerous law review articles,[16/] and several treatises on the subject,[17/] as well as a bi-monthly newsletter designed to keep attorneys apprised of current developments in the area of attorney's fees.[18/] As noted by Lloyd Cutler,[19/] in his Foreword to a recent three-volume treatise on court-awarded attorney's fees, this Act and other similar fee-

---

14/ 42 U.S.C.A. § 1988 (West 1981) at 155-305 and (West Supp. 1983) at 13-48.

15/ Maher v. Gagne, 448 U.S. 122 (1980); Maine v. Thiboutot, 448 U.S. 1 (1980); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); New York Gaslight Club v. Carey, 447 U.S. 54 (1980); Hanrahan v. Hampton, 446 U.S. 754 (1980); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

16/ See, e.g., Note, Awards of Attorney's Fees in the Federal Courts, 56 St. John's L. Rev. 277 (1982) (citing numerous other articles on the subject); see also Fioretti & Convery, Attorney's Fees Under the Civil Rights Act—A Time for Change, 16 J. Mar. L. Rev. 261 (1983).

17/ E. Larson, Federal Court Awards of Attorney's Fees (1981); H. Newberg, Public Interest Practice and Fee Awards (1981); M. Derfner & A. Wolf, Court Awarded Attorney Fees (1983).

18/ Attorney Fee Awards Reporter (Harcourt Brace Jovanovich).

19/ L. Cutler, Foreword to Derfner & Wolf, supra at vii.

shifting statutes "have created a new field of law that has grown so fast and become so complex that it has baffled the efforts of courts and lawyers to comprehend and apply it."

The vast amount of litigation on attorney's fees has led the courts to complain that "the fee proceedings have become the main event rather than the side show" such that "the [attorney's fees] tail is wagging the [civil rights] dog." 20/ The Supreme Court has added its voice to this mournful chorus, recently stating that "a request for attorney's fees should not result in a second major litigation." 21/ Other concurring and dissenting justices in the same case characterized fee litigation as "one of the least socially productive types of litigation imaginable" and bemoaned the fact that "[s]uch appeals [from fee awards], which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988." 22/ Those justices went on to state that:

> Congress enacted § 1988 . . . not to spawn litigation, however interesting, over [attorney's fees] . . . . In systemic terms, attorney's fees appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate.
>
> Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake. 23/

As the above quotation indicates, the flood of litigation under § 1988 has done little to resolve the many questions arising from its implementation. Very few hard and fast rules have developed, and

---

20/ Mills v. Eltra Corp., 663 F.2d 760, 761 (7th Cir. 191) (186 hours devoted to case on the merits and over 350 hours on the fee portion).

21/ Hensley v. Eckerhart, 103 S. Ct. 1933, 1941 (1983).

22/ Id. at 1944 (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part, dissenting in part).

23/ Id. at 1950-51.

conflicts exist not only among circuits but often among the district courts or panels of a single circuit.[24] As a result of this continuing confusion, litigation in this area will undoubtedly continue to expand. For example, as indicated by the numerous lower-court majority and dissenting opinions citing or "explaining" Hensley v. Eckerhart,[25] the Supreme Court's latest "pronouncement" on § 1988, that case, like many of its predecessors, has apparently raised as many questions as it has answered.

Apparently, the confusion over the proper interpretation and application of § 1988 can be resolved only by the Congress. As noted by one commentator,

> Because [fee-shifting] is contrary to two hundred years of experience in American federal courts, the cases have been difficult for lawyers and judges alike. Understanding has not been materially helped by Congress which has frequently passed attorney fee provisions with . . . only minimal or inconsistent direction on how the measures are to be interpreted and applied.

Derfner & Wolf, supra at ix. Only by setting clear statutory standards for the application of the Act can the rising tide of needless litigation be stemmed.

> **Recommendation No. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.**

---

[24] Compare, e.g., New York Association for Retarded Citizens v. Carey, 711 F.2d 1136 (2d Cir. 1983) with Stenson v. Blum, No. 81-7385 (2d Cir. 1982), cert. granted, 103 S. Ct. 2426 (1983); compare also National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), with Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 (D.C. Cir. 1982), and Jordan v. United States Department of Justice, 691 F.2d 514 (D.C. Cir. 1982).

[25] 82 Shepard's United States Citations (Supp. No. 6) at 308 and (Supp. No. 7) at 96.

Finding No. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

The proponents of § 1988 touted the Act, as its name implies, as a measure designed to protect "basic" and "fundamental" civil rights by encouraging private enforcement of our "major civil rights laws," including § 1983.[26] Although there is strong evidence that Congress viewed § 1988 as a civil rights measure,[27] the Supreme Court subsequently held in Maine v. Thiboutot that fees are available not only in civil rights cases but in any action under § 1983, which the Court construed to include cases arising under any federal statute or constitutional provision.[28] In response to the state's argument that such a construction is contrary to legislative intent, the Court suggested that "[t]hat argument . . . can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983."[29] In his dissenting opinion in Maine v. Thiboutot, Justice Powell predicted that the Court's decision would "dramatically expand the liability of state and local officials and may virtually eliminate the 'American Rule' in suits against those officials." In Justice Powell's prescient view, the

> practical effect [of the majority opinion] means that state and local governments, officers and employees now face liability whenever a person believes that he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights.

---

[26] See floor debates and House and Senate reports cited in Introduction, supra.

[27] See Maine v. Thiboutot, 488 U.S 1, 25-26 (1980) (Powell, J., dissenting); Comment, The Scope of the Civil Rights Attorney's Fees Awards Act After Maine v. Thiboutot, Maher v. Gagne, and Supreme Court of Virginia v. Consumers Union, 66 Iowa L. Rev. 1301, 1311-13 (1981); Case Comment, Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorney's Fees After Maine v. Thiboutot, 61 B.U. L. Rev. 1069, 1086-89 (1981).

[28] Id. at 4-9.

[29] Id. at 8.

> . . . [I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.[30]

Even at that time, Justice Powell observed that "[t]here is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought."[31]

Unfortunately for state governments and their taxpayers, Justice Powell's prediction has now become a painful and expensive reality. Fees are now routinely sought and awarded in even the most routine state court reviews of administrative agency decisions, having little or no bearing on civil or equal rights. For example, the Supreme Judicial Court of Massachusetts ruled that a plaintiff who succeeded in obtaining a reversal of an administrative decision, thereby obtaining $250 toward the purchase of a washing machine, was entitled to attorney's fees under § 1988. The court reasoned that since the plaintiff's complaint contained a claim, not reached by the court, that the regulation in question violated the Equal Protection Clause of the United States Constitution (by discriminating between those who have broken-down washing machines and those who have none), a claim which the court viewed as "substantial," the action was one to enforce the provisions of § 1983, thereby invoking the fee-shifting provisions of § 1988.[32]

The Stratos case illustrates another related problem that has arisen under § 1988. Relying on statements in the legislative history of the Act that, in cases containing both § 1983 and non-§ 1983 claims, if the § 1983 claim meets the "substantiality" test articulated in Hagans v. Lavine, 415 U.S. 528 (1974), then attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim,[33] courts have often awarded fees where the § 1983 claim is weak, but not "obviously frivolous," "absolutely devoid of merit," or "wholly insubstantial."[34] As noted by Justice Rehnquist in his dissenting opinion in Hagans, the substantiality test is met whenever the "plaintiff is able to plead his claim with a straight face."[35] The effect of that test is therefore to stand the concept of federalism on its head by "federalizing" nearly all claims against state or local officials.[36]

---

[30] Id. at 22, 24.

[31] Id. at 24.

[32] Stratos v. Department of Public Welfare, 387 Mass. 312 (1982). Although the court viewed the claim as "substantial" under the "painstakingly minimal standard of substantiality defined in Hagans v. Lavine," id. at 319, it expressed doubt that plaintiff could have actually prevailed on his equal protection claim, given the minimal level of scrutiny applicable to classifications drawn by law or government practice where, as here, no suspect classification or fundamental right is involved. Id. at 318.

The application of the substantiality test to § 1988 means that plaintiffs can recover fees under § 1988, even when they lose on their federal civil rights claims. For example, in Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977), the district court had ruled in plaintiff's favor on state law grounds but had ruled against him on his § 1983 claim. Nevertheless, the Sixth Circuit held that plaintiff was entitled to fees under § 1988, since his claim under § 1983 was "substantial."

Clearly, in enacting § 1988, Congress did not intend to encourage litigants to pad their meritorious state law complaints with weak or meritless civil rights claims, in order to obtain fees under § 1988. Yet, that is the net effect of the case law discussed above. Congress must therefore act to clarify its original intent that § 1988 be used to enforce our most basic and fundamental civil rights. The Association is concerned that the statute not be revised so as to impair individuals seeking full redress for violations of their civil or equal rights. However, the Association believes that a restoration of the scope of the Act to pre-Thiboutot coverage is necessary.

In so acting, Congress will be able to answer a number of nagging questions concerning the proper scope of the statute: should it apply to cases brought by corporations or other business entities? Should it apply to all cases raising constitutional questions? One case that raises these questions and has already sparked considerable public criticism is Grendel's Den v. Larkin, No. 77-3418-T (D. Mass.). In that case, Harvard Law School Professor Lawrence Tribe is seeking almost $350,000 in attorney's fees and costs for his successful efforts to obtain a liquor license for a restaurant in Harvard Square. Although the Supreme Court's decision on the merits of that case was based on the Due Process and Establishment Clauses of the United States Constitution, it is unlikely that this liquor license matter is the type of case that Congress had in mind when it enacted § 1988 as a means of protecting disadvantaged victims from violations of their most basic human rights. 37/

---

[33] H.R. Rep. at 4 n. 7. It should be noted that the test of "substantiality" articulated in Hagans was developed for purposes of federal jurisdiction and is therefore ill-suited to determining whether a party has prevailed on the merits. See M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶ 12.01 (1983).

[34] Hagans v. Lavine, supra at 536-43; see Stratos, supra at 319.

[35] Id. at 564.

[36] See M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶¶ 12.01-03 (1983).

> **Recommendation No. 2: The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.**

37/ See 122 Cong. Rec. 35,122 (1976) (remarks of Rep. Drinan, sponsor) (Act passed to encourage enforcement of civil rights by "'private attorney[s] general' advancing the rights of the public at large, and not merely some narrow parochial interest").

Finding No. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

Although the Act expressly provides that only a "prevailing" party may be awarded fees, the application of this provision by the courts to cases where parties have not prevailed in any meaningful sense has effectively eliminated the prevailing party requirement, contrary to the express language of the statute and the underlying Congressional intent. In numerous cases where judgment was rendered for the defendant, courts have nevertheless viewed the plaintiff as a prevailing party for purposes of § 1988 fee awards. For example, in NAACP v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3rd Cir. 1982), cert. denied, 103 S. Ct. 1499 (1983), the district court dismissed plaintiffs' claims against the state and federal defendants and, after trial, held that plaintiffs had failed to prove discrimination by the Wilmington Medical Center and accordingly entered judgment for the defendants and denied plaintiffs' request for fees. On appeal, the Third Circuit reversed the denial of fees, stating that "[t]he fact that a judgment was ultimately entered in favor of [the defendant] does not make the plaintiffs any less the prevailing party.[38/] The court ruled that plaintiffs had "prevailed" since they had obtained "some of the benefits sought by the litigation," even though the actual "benefits" obtained, by means of an agreement between the state and federal defendants, had been vigorously but unsuccessfully opposed by the plaintiffs in the litigation.[39/]

Similarly, in Dayan v. Board of Regents, 620 F.2d 107 (5th Cir. 1980), the Fifth Circuit affirmed the district court's ruling for the defendant on the merits, that the defendant's "rational procedural policy violates neither the First Amendment nor the Fourteenth Amendment to the United States Constitution," yet also affirmed an award of fees to the plaintiffs on the ground that they had obtained "substantial voluntary relief as a direct result of their lawsuit."[40/] Another example of an award of fees to a losing party appears in Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979), cert. denied, 448 U.S. 906 (1980), in which the appellate court remanded the case for a redetermination of plaintiffs' eligibility for fees while, at the same

---

[38/] Id. at 1167.

[39/] Id. at 1167-68.

[40/] Id. at 108 (emphasis omitted).

time, affirming the district court's holding that the procedures employed by the defendant in processing suspected unemployment fraud cases adequately protected plaintiffs' statutory and constitutional due process rights.

In a number of cases, plaintiffs have been awarded fees where the benefits sought in their complaint were obtained by legislative action before a final judicial decision could be rendered on the merits. For example, in DeMier v. Gondles, 676 F.2d 92 (4th Cir. 1982), plaintiffs who voluntarily dismissed their claim after the state legislature enacted a statute that achieved the object of the suit were awarded fees, even though other complaints may have contributed to the change in policy.[41]

A striking example of the inequities that can result is Institutionalized Juveniles v. Secretary of Public Welfare, 568 F. Supp. 1020 (E.D. Pa. 1983). There, defendants had prevailed in the United States Supreme Court on what the District Court recognized were the central issues of the case. Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979). Nonetheless, the District Court awarded almost $90,000 in fees, including a 50 percent multiplier, based on its view that various regulatory and statutory changes during the period of litigation provided some of the plaintiffs with some of the benefits they sought. An appeal is pending.

Although the legislative history of § 1988 indicates that the term "prevailing party" is to be read broadly to include cases that end in a consent decree or out-of-court settlement, "none of the cases cited in the House or Senate Reports involves a fee award in the context of such a remote and extra-judicial resolution of a lawsuit as legislative preemption."[42] Furthermore, even if such a result had

---

41/ See also Armstrong v. Reed, 462 F. Supp. 496 (N.D. Miss. 1978) (where state statute was amended while case was pending, judgment entered in state defendants' favor, but fees awarded to plaintiffs since they "accomplished their goal"); Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) (the First Circuit reversed the district court's denial of fees and awarded approximately $15,000 to the plaintiffs, based on their "success" in obtaining a short injunction pending appeal of a lower court denial of a requested preliminary injunction, even though the actual benefits, appropriation of welfare funds, were conferred by the state legislature, not by the defendants or the court, even before the injunction went into effect).

42/ Cicero v. Olgiati, 473 F. Supp. 653, 655 (S.D. N.Y. 1979).

been intended by the enactors of § 1988, the problems involved in determining whether and to what extent a particular lawsuit acted as a "catalyst" for legislative change, make the application of the "prevailing party" standard to cases mooted by legislative action judicially unworkable. Since legislators act from multifarious motives, it is difficult, if not impossible, to determine the impact of a particular lawsuit on a legislative body as a whole. 43/ Moreover, as recognized by one court, even attempting to make such a determination "might constitute an impermissible inquiry into legislative motive." 44/

Cases resolved by settlement present similar problems. For example, in Young v. Kenley, 641 F.2d 192 (4th Cir. 1981), the Fourth Circuit reversed a denial of attorney's fees to a plaintiff who alleged discrimination in the denial of a position for which she had never even applied. Once plaintiff applied for the position, after being urged to do so by the defendants and the district court, she passed the required test and was given the position in question, and the case was settled on that basis. Over the strong dissent of Justice Rehnquist, joined by Justice O'Connor, the Supreme Court denied a petition for a writ of certiorari on the prevailing party issue. 45/ In his dissent from the denial of certiorari, Justice Rehnquist suggested that an award of fees in such circumstances "seems largely to disregard th[e] central purpose of § 1988 [—] . . . to 'enforce' the civil rights laws or to . . . promote[ ] their policies for the benefit of the public at large," and indicated that fees should not be awarded "if the discernible benefit was conferred gratuitously by the defendant or was taken simply to avoid further litigation expenses." 46/ Nevertheless, on remand, the district court ultimately awarded fees in an amount exceeding $30,000.

Thus, although Congress stressed that § 1988, unlike other more liberal fee provisions, was intended to apply only where a party

---

43/ M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 9.02 (1983).

44/ Bly v. McLeod, 605 F.2d 134, 138 n. 6 (4th Cir. 1979), cert. denied, 445 U.S. 928 (1980).

45/ Kenley v. Young, 455 U.S. 961 (1982).

46/ Id. at 967.

has "prevailed," [47] that intent has been undercut by subsequent court decisions construing the term "prevailing" so broadly as to include cases where the party awarded fees has actually lost the case on the merits or failed to succeed in any meaningful sense. Congress must therefore reassert its initial intent in a manner that will prevent such perversions of the statute's seemingly straightforward prevailing party requirement.

> **Recommendation No. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.**

---

[47] See, e.g., H.R. Rep. at 6-7. Compare, Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 36 A.L.R. Fed. 519 (2nd Cir. 1976), applying stricter test under attorney's fees provision of the Freedom of Information Act (FOIA), 5 U.S.C. S 522 (a)(4)(E) under which "court may assess against the United States reasonable attorneys fees . . . in any case . . . in which the complainant has substantially prevailed".

Finding No. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

In many cases, large amounts of fees have been awarded, despite the fact that the plaintiff received only nominal relief on the merits. For example, in Skoda v. Fontani, 646 F.2d 1193, 1194 (7th Cir. 1981), the court held that plaintiffs, who won a jury verdict of only one dollar on their civil rights claim, for which they had claimed $200,000 in damages, were "prevailing parties," contrary to the district court's conclusion. On remand, the district court reluctantly awarded plaintiffs $6,086.12 in fees and costs.[48] Similarly, in Milwe v. Cavuoto, 653 F.2d 80, 83-84 (2d Cir. 1981), the court held that "the one dollar assessed against [the defendant] on plaintiff's constitutional claim would be sufficient to support an award of fees under the Act."

Another case in which the amount of fees awarded was grossly disproportionate to the degree of success on the merits is Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982), in which the Ninth Circuit found no abuse of discretion in the district court's award of $243,343.75 in fees incurred in obtaining a jury verdict of $33,350. An even more extreme example of a court's failure to proportion a fee award to the degree of success obtained is the decision reached in Haygood v. Younger, No. S-75-738LKK (E.D. Cal. 1983), a case in which plaintiff alleged illegal confinement in a state prison. The complaint named sixteen defendants and alleged nineteen separate causes of action. After five years of pre-trial proceedings, eleven defendants were dismissed or granted summary judgment, and seventeen causes of action were dismissed. Three defendants were granted a directed verdict after the plaintiff's case in chief. The jury returned a verdict of $640 against one of the remaining defendants and $1,450 against the other. The plaintiff then sought $75,968.75 in attorney's fees. Included was a demand for $17,831.25 in "paralegal fees" for assistance claimed to have been provided by the plaintiff's inmate advisor. The defendants' request for discovery and for an evidentiary hearing to contest the fee request were both denied by the court. The court then awarded $45,383.17 in attorney's fees, including $9,900 in paralegal fees for the inmate advisor. The award was apparently reduced from the amount originally requested only because counsel's representation had been of poor quality and the hours claimed had been "padded."

---

[48] 519 F. Supp. 309 (N.D. Ill. 1981).

The effect of such decisions is to encourage civil rights plaintiffs to pad their complaints with multiple, meritless claims, "secure in the knowledge that any tactic reasonably related to his cause will be compensable."[49] Not only is the "penalty" incurred by the defendant in such cases disproportionate to the injury inflicted, but such results also operate to the disadvantage of plaintiffs (as opposed to their counsel). Plaintiff's counsel, who can expect to be compensated for time spent on all claims, if he prevails to any extent, has no incentive to settle a case in the early stages of litigation, but rather is encouraged to litigate every claim to the maximum extent. Aggrieved plaintiffs are thereby deprived of the benefit of an early settlement, and courts, as well, are subjected to congested dockets.[50]

The Supreme Court's recent decision in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), directing the lower court to reconsider the amount of its fee award in light of the extent of success achieved by the plaintiffs, is a step in the right direction, but it will not resolve all of the problems discussed above and may raise additional ones. For example, it remains to be seen how the lower courts will resolve the apparent contradiction between the Court's directive that, in cases where plaintiffs only partially succeed, the "results obtained" may warrant a downward adjustment in the amount of fees awarded,[51] with its caveat that "[w]here a plaintiff has obtained excellent results . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."[52] Rather than "clarify the proper relationship of the results obtained to an award of attorney's fees," as the Hensley case purports to do,[53] it will undoubtedly generate further litigation on what constitutes an "unrelated claim" or "excellent results."[54] As stated by Justice Brennan in his concurring and dissenting opinion in Hensley, "Regular appellate scrutiny of issues like those in this case . . . generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after."[55/] Indeed, in post-Hensley cases in the lower courts, Hensley is relied upon by fee applicants and opponents alike and is cited in both majority and dissenting opinions,[56/] indicating that additional legislative guidance is needed on the propriety of apportioning the amount of fees awarded to the degree of success attained by the prevailing party.

---

[49] Fioretti & Convery, Attorney's Fees Under the Civil Rights Act—A Time for Change, 16 J. Mar. L. Rev. 261, 278 (1983).

[50] Id.

[51] Id. at 1940.

[52] Id.

[53] Id. at 1939.

[54] See id. at 1950 (Brennan, J., concurring in part and dissenting in part).

> **Recommendation No. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fee awards to the degree of success actually attained by the prevailing party.**

55/ Id. at 1951.

56/ See 82 Shephard's United States Citations (Supp. No. 6) at 308 (Supp. No. 7) at 96.

Finding No. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

The proponents of the Fees Act emphasized the discretionary nature of the Act, which expressly provides that "the court, *in its discretion, may* allow the prevailing party . . . a reasonable attorney's fee" (emphasis added), and contrasted that Act with other statutes *requiring* that fees be awarded to a prevailing party.[57] However, the Senate Report suggested that, in exercising their discretion, courts should apply the standard articulated by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), i.e., that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

That standard, which has become known as the *Newman* standard, "was initially used by the courts to explain or justify the *mandatory* imposition of fees."[58] Application of such a standard is appropriate where the purpose of the fee provision is "to *encourage* suit or to provide an *incentive* to litigate,"[59] not where the provision in question was enacted "mainly for the purpose of preventing the cost of litigation from *deterring* a suit."[60] Since the purpose of § 1988, as articulated by its proponents, was not to encourage litigation, but rather "to insure that the high cost of litigation does not bar the federal court to citizens who seek to

---

57/ *See* H.R. Rep. at 8. Approximately half of the federal fee-shifting statutes are mandatory. M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 5.02 [2] (1983); *see, e.g.*, *Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 626(b); Truth in Lending Act, 15 U.S.C. §§ 1640(a), 1667b(a), 1667d(a), 1681n, 1681o, 1961e(d); Civil Service Reform Act of 1978, 5 U.S.C. § 5596(b)(1)(A)(ii); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417(a)(4).

58/ Derfner & Wolf, *supra* at ¶ 10.01 (emphasis added). *See, e.g.*, *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

59/ Derfner & Wolf, *supra* at ¶ 10.01.

60/ *Id.* (emphasis added).

enforce their rights under our civil rights laws," [61] the rationale underlying the Newman standard is inapplicable to § 1988.

Despite the incompatibility of the Newman standard with the overall purpose of the Act, and although Congress chose not to use the Newman language in § 1988, [62] most courts, in reliance on the Senate Report, interpret § 1988 in a manner contrary to its express language. [63]

The practical effect of the application of the Newman standard to § 1988 is to make the award of fees to a prevailing party mandatory, since courts have rejected virtually every "special circumstance" proferred by defendants as a justification for denying fees. [64] Among the special circumstances that have been rejected by appellate courts as rendering an award of fees unjust are defendants' good faith,[65] defendants' reliance on previous court orders or government regulations,[66] that defendants' refusal to expend funds was based on lack of legislative appropriation,[67] that defendants were compelled by law to engage in the challenged conduct,[68] that plaintiff received only nominal damages,[69] that the fee award would be paid by a public entity and would thereby impair that entity's ability to provide further services,[70] that plaintiffs were able to afford counsel,[71] that plaintiffs refused to settle,[72] and that the suit did little or nothing to further civil rights.[73] Even the fact that the plaintiff committed perjury during trial has been rejected as a special circumstance justifying a denial of fees.[74/]

---

[61] 122 Cong. Rec. 31,471 (1976) (remarks of Sen. Mathias). See also 122 Cong. Rec. 31,472 (remarks of Sen. Kennedy), 35,118, 35,128 (remarks of Rep. Sieberling), 35,126 (remarks of Rep. Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6.

[62] Compare, e.g., the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d) (2), which provides as follows:

> If a consumer finally prevails . . . he may be allowed by the court to recover . . . attorney's fees . . ., unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate.

[63] Fioretti & Convery, Attorney's Fees Under the Civil Rights Act— A Time for Change, 16 J. Mar. L. Rev. 276 (1983).

[64] Derfner & Wolf, supra, at ¶ 10.02[3] (1983); Fioretti & Convery, supra at 276; Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?, 51 Fordham L. Rev. 320 (1982).

---

[65] *See*, *e.g.*, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 739 (1980); *Hutto v. Finney*, 437 U.S. 678, 693 (1978); *Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978); *Holley v. Lavine*, 605 F.2d 638, 646 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); *Bills v. Hodges*, 628 F.2d 844, 847 (4th Cir. 1980); *Ellwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 956 (5th Cir. 1981); *Haycraft v. Hollenbach*, 606 F.2d 128, 132 (6th Cir. 1979); *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980); *Pickett v. Milam*, 579 F.2d 1118, 1121 (8th Cir. 1978); *Seattle School District No. 1 v. Washington*, 633 F.2d 1338, 1349 (9th Cir. 1980), *aff'd*, 102 S. Ct. 3187 (1982); *Love v. Mayor*, 620 F.2d 235, 236 (10th Cir. 1980).

[66] *See*, *e.g.*, *Crosby v. Bowling*, 683 F.2d 1068, 1072-73 (7th Cir. 1982); *Johnson v. Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979).

[67] *See*, *e.g.*, *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982).

[68] *See*, *e.g.*, *Ellwest Stereo Theatre, Inc. v. Jackson*, *supra* at 956.

[69] *See*, *e.g.*, *Skoda v. Fontani*, 646 F.2d 1193 (7th Cir. 1981).

[70] *See*, *e.g.*, *Morrison v. Ayoob*, 627 F.2d 669, 673 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

[71] *See*, *e.g.*, *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

[72] *See*, *e.g.*, *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980).

[73] *See*, *e.g.*, *Concerned Democrats v. Reno*, 689 F.2d 1211 (5th Cir.), *rev'g* 493 F. Supp. 660 (S.D. Fla. 1980).

As a result, one judge has described the application of the special circumstances exception by the courts as

> render[ing] [the exception] in effect a nullity. This interpretation is reminiscent of the passage wherein Macbeth remarked, "Life is but a walking shadow; . . . a tale told by an idiot, full of sound and fury, signifying nothing."[75/]

Moreover, where fees are awarded despite the fact that, for example, the defendant acted in good faith, the plaintiff obtained only nominal damages, and the action did nothing to further civil rights, "a question arises as to what goals of the Attorney's Fees Act, if any, are being furthered."[76/] In such cases, "the only true victor may be the plaintiff's attorney."[77/]

Furthermore, given the prospect of a mandatory fee award if he prevails, plaintiff's counsel has no incentive to enter into a pretrial settlement. The more time he spends on the case, the higher his potential fee award. The motivation to proceed to trial is therefore enhanced, and the incentive to settle, diminished.[78/]

Therefore, in order to restore the judicial discretion expressly intended by the Act, but virtually eliminated in its application, Congress should amend the Act to specify circumstances in which the courts' discretion may be exercised to deny fees. Such an amendment would not only further the original purpose of the Act, but would also be consistent with the standard applicable to fee awards against federal defendants under the Equal Access to Justice Act, which expressly provides that fees are not to be awarded when the

---

[74/] Price v. Pelka, 690 F.2d 98 (6th Cir. 1982).

[75/] Connor v. Winter, 519 F. Supp. 1337, 1348 (S.D. Miss. 1981) (Cox, J., dissenting).

[76/] Fioretti & Convery, supra at 277.

[77/] Id.

[78/] Fioretti & Convery, supra at 277.

government has demonstrated a substantial justification for its position.[79/] Since the purpose of the Equal Access to Justice Act, as set forth in its legislative history,[80/] is parallel to that of the Fees Act, there is no reason why state and local defendants should not share the protection, enjoyed by federal defendants under the Equal Access to Justice Act, from the imposition of unjust awards of attorney's fees.

Recommendation No. 5: The Congress should amend the Fees Act to expressly provide that a court may deny fees where, in the court's view, denial is appropriate, including, but not limited to, cases in which the court determines;

A. that the defendant's position was substantially justified or advanced in good faith; or

B. that an award of fees would not further the substantive purposes of the Act.

[79/] 5 U.S.C. § 504(a) (1); 28 U.S.C. § 2412(d) (1) (A). Congress created this exception as a "safety valve" to preclude fee awards when the federal government "advance [ed] in good faith the novel but credible extension and interpretations of the law that often underlie vigorous enforcement efforts." S. Rep. No. 253, 96th Cong., 2d Sess. 7 (1980). See also, Vermont Low Income Advocacy Council, Inc. v. Usery, supra, at 36 ALR F. at 525, 526. (FOIA attorney's fees would not be awarded if the the government's withholding of information "had a reasonable basis in law").

[80/] See Pub. L. No. 96-481, § 201, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4984 (purpose of Act is to remove the financial deterrent to litigation against the United States).

Finding No. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

At the time Congress enacted the Fees Act, the pertinent House and Senate Reports indicated that the appropriate standards for determining what constitutes a reasonable fee are those contained in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).[81/] Both the House and Senate reports expressed confidence that the application of those standards would "result[ ] in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys."[82/]

That hope has not been realized. As early as 1977, one commentator noted that "[t]he only truly consistent thread that runs throughout federal court decisions on attorney's fees is their lack of consistency."[83/] The situation is no better today. Some courts, finding the Johnson criteria too subjective and imprecise, have applied different approaches to computing a reasonable fee, most notably the lodestar approach, first articulated in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I), in which a reasonable hourly rate is multiplied by the number of hours reasonably spent to produce a lodestar figure, which may then be adjusted upward and downward depending on additional factors not applied in determining reasonable

---

81/ S. Rep. at 5; H.R. Rep. at 8-9. The twelve Johnson factors, similar to those contained in the American Bar Association's Code of Professional Responsibility, are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

82/ S. Rep. at 5; see also H.R. Rep. at 8-9.

83/ Berger, Court Awarded Attorney's Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 283-93 (1977).

hours and rates.[84] Still other courts have adopted a hybrid approach, combining the lodestar method with the *Johnson* criteria.[85] With different approaches being applied by different circuits and even by various courts within each circuit, parties litigating cases under § 1988 are subject to different approaches and, hence, different results. Courts disagree on what factors should be applied, how they should be applied, and even what they mean. Opposite holdings have been made on virtually every aspect of fee computation.[86] As a result, in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent.[87]

As noted by one commentator, the adverse effects of this confusion are several:

> First, it inevitably results in unfairness to both attorneys and litigants. . . .
>
> A second consequence of the chaotic state of the law is an excessive amount of litigation concerning the proper fee amount. . . .[88]
>
> A third consequence of the existing state of the law is the arbitrary and haphazard allocation of legal resources . . .

---

[84] *See, e.g., Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980); *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*Copeland III*).

[85] *See, e.g., Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982); *Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1981); *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982).

[86] M. Derfner & A. Wolf, *Court Awarded Attorney's Fees* ¶ 16.01 (1983).

[87] Comment, *Calculation of a Reasonable Award of Attorneys' Fees under the Attorneys' Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 378 (1980).

[88] West's annotations to 42 U.S.C.A. § 1988, concerning guidelines and determinations of a "reasonable" fee, now fill 44 closely printed pages. 42 U.S.C.A. § 1988 (West 1981) at 221-58, (West Supp. 1983) at 29-39.

> Finally, the high degree of subjectivity involved in most fee decisions is unhealthy for both the legal profession and for the conduct of litigation . . .[89]

Although, "[i]deally, . . . litigants will settle the amount of a fee,"[90] this "ideal" cannot be realized where the parties have no way of estimating how much a court would award in a particular case.

Finally, the most significant adverse effect of the various methods presently employed to calculate the amount of fee awards under the Act is that the awards generated by the application of those methods cannot be characterized as "reasonable," in any conceivable sense of that term. The state of New York, for example, is currently appealing two cases in which the combined fee awards exceed $2 million. The cumulative effect of such awards on public treasuries is devastating. The state of Washington, for example, currently has pending against it over $8 million in attorney's fees claims. The state of Florida paid nearly $2.6 million in court-awarded attorney's fees during 1983 alone, and fee awards in recent years in that state have equalled roughly 80 percent of all substantive civil rights judgments against the state. Although the numbers are smaller, the state of Kansas has paid more in attorney's fees awards during the past three years than it has for all other settlements and judgments of any kind during that same period.

The escalating amount of fee awards has evoked harsh criticism from the judiciary, the press, and the public, as well as from many attorneys. In response to a survey of attorneys and federal judges, conducted by the Federal Judicial Center, 111 of 184 respondents agreed with the statement that "attorneys in class action suits [including civil rights actions] often reap 'windfall profits.' "[91] Judges also agreed, at a ratio of nearly three to one, that "fee abuses are a serious problem."[92] Concluding that "[t]he feeling that attorneys reap exorbitant fees appears to run deep," Professor Arthur Miller noted that "current attempts to reform the fee awards standards may be a logical response to a problem widely thought to exist by the judiciary, and many attorneys, as well as by the press and the public."[93/]

---

[89] Berger, supra at 283-93.

[90] Hensley v. Eckerhart, 103 S. Ct. 1933, 1941 (1983).

[91] A. Miller. Attorneys' Fees in Class Actions (Federal Judicial Center 1980) at 300.

[92] Id. at 306.

Since the courts have thus been unable to arrive at consistent and workable standards for computing a "reasonable" fee under the Act, Congress should amend the statute to eliminate the chaos that is undermining its effective implementation. One partial solution that would eliminate much of the confusion and, at the same time, avoid blatantly excessive fees, would be for Congress to set a maximum hourly rate at which counsel may be compensated, as Congress was careful to do in the Equal Access to Justice Act, where the federal treasury was at risk.[94/] In order to avoid disparate treatment for state and local treasuries, Congress should afford them the same protection. Other specific amendments are recommended later in this report.

> **Recommendation No. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of $75 per hour.**

93/ Id. at 301.

94/ 5 U.S.C. § 504(b) (1) (A); 28 U.S.C. § 2412(d) (2) (A) (setting a maximum hourly rate of $75). The Association is sensitive to inflation's effect on the adequacy of an hourly rate and suggests that this should be adjusted periodically.

Finding No. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

The awarding of "bonuses" over and above the "lodestar" amount (reasonable number of hours spent times reasonable hourly rate) has become commonplace under § 1988.[95] This growing practice has netted spectacular fee awards in many cases, far in excess of the reasonable value of the services rendered. For example, in Bolden v. Pennsylvania State Police, 491 F. Supp. 958 (E.D. Pa. 1980), an employment discrimination case, the court increased the basic fee by 50 percent, converting an $88,450 award into $132,675 (the total award, including $6,685 for law student services and $12,612.50 for preparation and litigation of the fee application, came to over $151,000). Although the court noted that the legal issues in the case were not particularly novel, it awarded the 50 percent bonus on account of the "excellent quality" of the legal work and the case's advancement of civil rights.[96] Similar results were reached in the New York case of Population Services International v. Carey, 476 F. Supp. 4 (S.D.N.Y. 1979), in which a bonus of $23,240 was added to a base award of $46,760, because the attorneys demonstrated a "high degree of skill and comprehensive research." Presumably counsel's research would have already been reflected in the number of hours billed, and the attorneys' skill would be reflected in their hourly rates, making a further bonus superfluous. In Vecchione v. Wohlgemuth, 481 F. Supp. 776 (E.D. Pa. 1979), the court doubled the lodestar amount to account for delay in payment, the quality of counsel's work, the case's furtherance of civil rights, and defendants' bad faith. The resulting award exceeded $207,000.[97]

---

[95] Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981).

[96] Id. at 965-66. Presumably the purpose of any fee award under § 1988 is the advancement of civil rights.

The concept of such bonuses or multipliers is nowhere mentioned in the Act. The legislative history, while citing a few cases in which minimal bonuses or multipliers were awarded,[98] falls far short of evincing clear Congressional support for the use of bonuses in computing fee awards. Rather, the concept of bonus awards is entirely a judicial creation, conceived in contexts that are entirely inapposite to the application of § 1988.

The concept originated in antitrust cases resulting in the creation of an equitable fund out of which both plaintiffs and their counsel recover.[99] In awarding fees in such cases, "the court exercises its equitable jurisdiction over the relationship between an attorney and his amorphous client."[100] The rationale for fee awards in such cases is one of quantum meruit — "the members of the [benefited] group should pay 'compensation as was reasonable' . . . to

---

97/ Id. at 795-800. See also, e.g., Stenson v. Blum, No. 81-7385 (2d Cir. 1983), cert. granted, 103 S. Ct. 2426 (1983) (affirming 50 percent bonus); Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983) (approving multiplier of 2); Louisville Black Police Officers Organization, Inc. v. City of Louisville, 700 F.2d 268 (6th Cir. 1983) (approving 33-1/3 percent enhancement); Manhart v. City of Los Angeles, 652 F.2d 904 (9th Cir. 1981); vacated and remanded on other grounds, 103 S. Ct. 2420 (1983) (approving increments of 75 and 30 percent); Rajender v. University of Minnesota, 546 F. Supp. 158 (D. Minn. 1982) (multiplier of 3); Wells v. Hutchinson, 499 F. Supp. 174 (E.D. Tex. 1980) (multiplier of 2); West v. Redman, 530 F. Supp. 546 (D. Del. 1982) (multiplier of 1.75).

98/ S. Rep. at 6. Those cases were cited as examples of the application of the proper criteria for determining a reasonable fee. Congress nowhere expressly endorsed or even mentioned the use of bonuses.

99/ See, e.g., Lindy I, 487 F.2d 161 (3rd Cir. 1973); Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976) (Lindy II); City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2d Cir. 1974).

100/ Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3rd Cir. 1977).

the attorney representing their interests."[101] Under that theory, bonus awards make sense and are easily implemented, particularly where the case has created a large monetary fund out of which the award will be paid.

By contrast, fee awards under § 1988 are paid by the defendant in addition to any other judgment against him. Since the defendant is not the one who benefited from the action, the quantum meruit theory cannot be used to justify inflated awards in such cases. Nor can a bonus in such cases be characterized as part the of defendant's equitable "punishment" for legal wrongs against the plaintiffs, since, under § 1988, unlike in the antitrust cases, fees must be paid in addition to the compensatory relief on the merits, rather than out of it.[102]

An additional significant difference between fee awards in antitrust cases and those in § 1983 actions is that, in the latter, the fee award must be paid by a state or other public entity rather than by a private defendant. The state, unlike a private defendant, is a representative of the public interest; and the taxpayers who ultimately bear the burden of such awards are not guilty of any wrongdoing. Extra caution is therefore warranted in assessing the amount of the award so as not to disrupt state and local governments or unduly reduce the amount of money available for other public purposes. Since the rationales underlying bonus awards have no application in the context of § 1988, the adoption of this mechanism into the calculation of fees under § 1988 is not warranted.

Moreover, bonus awards are entirely inconsistent with the purposes of § 1988. First of all, bonuses are, by definition, "windfalls" to plaintiff's counsel, since bonuses are awarded in addition to "compensation of [plaintiffs'] legal expenses," which is all that Congress intended to provide.[103] As noted by one court, "multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve [the] goal" of attracting competent counsel.[104] Anything more than that is simply "unearned personal gain at the public expense"[105] or, in other words, "windfall."[106]

---

[101] City of Detroit v. Grinnell, supra at 469; Lindy I, supra at 165.

[102] See Berger, Court Awarded Attorneys Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 317-18 (1977); see also Hutto v. Finney, 437 U.S. 678, 695 (1978) (fee award under § 1988 not intended to "compensate the plaintiff for the injury that first brought him into court").

[103] See S. Rep. at 6 ("counsel . . . should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expneded on a matter' ").

Second, even where some rationale is given for awarding a bonus, the amount of the bonus awarded is entirely arbitrary,[107] thus violating Congress's mandate that fee awards be "reasonable." Even courts that have endorsed the use of bonuses have commented on the subjectivity of arriving at a precise amount.[108] As noted by one court, the use of bonuses is an "open-ended device" that "is able to undo in a twinkling . . . all of the careful calculations" involved in setting the lodestar amount.[109] The arbitrary nature of such awards is exacerbated by the fact that a difference between a bonus, of, e.g., 10 percent and one of 25 percent can result in a difference of hundreds of thousands of dollars in a protracted case.

The lack of consistency and predictability of bonus awards is directly contrary to Congress's purpose of ensuring uniformity and consisistency in fee awards.[110] Furthermore, as a practical matter, the unpredictability of bonus awards makes it difficult for the parties to settle fee claims, since the prospect of bonus awards makes it impossible to estimate, with any degree of accuracy, the total amount

---

104/ Oliver v. Kalamazoo Board of Education, 576 F.2d 714, 716 (6th Cir. 1978).

105/ Northcross v. Board of Education, 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

106/ Id.; see also Berger, supra at 292, 317-18, 324 n. 167; Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651, 675.

107/ See Berger, supra at 290.

108/ See, e.g., National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1382 (D.C. Cir. 1982) (amount of bonus "inherently imprecise"); Foster v. Gloucester County Board of Chosen Freeholders, 465 F. Supp. 293, 302 (D. N.J. 1978). See also M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 16.05[1] (1983).

109/ Swicker v. William Armstrong & Sons, Inc., 484 F. Supp. 762, 777 (E.D. Pa. 1980).

110/ See 122 Cong. Rec. 35,118, 35,122 (1976) (remarks of Rep. Sieberling); H.R. Rep. at 1.

of fees a court would be likely to award in a particular case.[111] Finally, the exorbitant fee awards that result from the use of bonuses certainly cannot be characterized as "reasonable" in amount.[112]

An examination of the justifications offered by courts in support of bonus awards reveals that those justifications are, in fact, fallacious and inconsistent with the overall purposes of the Act. The primary justification used to support bonus awards is that a bonus is necessary to account for the contingent nature of success, often termed the "risk of loss" or the "contingency factor." The roots of this concept can be found in the contingent fee agreements that often obtain betwen tort plaintiffs and their attorneys. In those circumstances, a contingent fee arrangment has "an economic rationale: it compensates plaintff's lawyer for his services as an entrepreneur who bears the risks of litigation."[113] By taking a number of cases on a contingency basis, plaintiff's counsel can use the large fees recovered in successful cases to cover the losses he incurs in unsuccessful ones. Such arrangements thus have the purpose and effect of financing not only meritorious but also losing cases.[114]

However, such a purpose and effect are entirely inconsistent with those of Congress in enacting § 1988. Congress intended the Act to encourage and provide compensation only for *meritorious* cases,[115] certainly not for losing cases,[116] nor even for cases that have a reasonable chance of success but do not ultimately succeed.[117] In fact, Congress intended the Act to *deter* meritless suits.[118] As the Supreme Court said recently with respect to another fee statute, "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits."[119]

---

[111] For example, in *Brewster v. Dukakis*, 544 F. Supp. 1069 (D. Mass. 1982), plaintiffs' counsel sought fees of $1.2 million, including a 100% bonus. Following litigation of the fee claim, the district court awarded $386,204, including a 10% bonus. If bonuses were not available, the gulf between what plaintiffs were seeking and what defendants were willing to pay would have been much narrower and settlement much more likely.

[112] The size of such awards has brought harsh criticism from members of the public as well as the bench and bar. *See* Berger, *supra* at 292 and n. 55; *Alpine Pharmacy, Inc. v. Charles Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973) ("lucrative fees involved in recent class actions may evoke public acceptance of an Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden' ").

[113] Leubsdorf, *supra* at 480.

[114] *Copeland III*, 641 F.2d 880, 913 (D.C. Cir. 1980) (Wilkey, J. dissenting); Leubsdorf, *supra* at 474 ("The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one"); *id.* at 491-92.

As pointed out by one commentator, ignoring the contingency factor is more consistent with Congressional intent: "Putting the lawyer to the risk in close cases helps weed out meritless claims . . . [and] provide[s] a desirable check on the . . . increase in court docket congestion."[120] Moreover, "[i]f [unsuccessful] litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another case."[121]

Contingency bonuses have the further untoward effect of rewarding, and hence encouraging, marginal claims to an even greater extent than clearly successful ones, since the amount of a contingency bonus varies inversely with the strength of plaintiff's claim. 122/ Awarding bonuses on this basis is patently unfair to defendants, since such awards have the converse effect of forcing defendants to pay higher attorney's fees where they had a strong, but ultimately unsuccessful, defense than where violations of plaintiffs' rights were clear from the outset. 123/ Such awards cannot serve to deter egregious civil rights violations by potential defendants, one of the subsidiary purposes of the Act, 124/ since defendants are "penalized" only where it is unclear, prior to litigation, that their conduct is, in fact, illegal. 125/

---

[115] 122 Cong. Rec. 35,118 (remarks of Rep. Sieberling) ("provide for . . . compensation . . . in meritorious cases"), 35,127 (remarks of Rep. Jordan) ("access to the system of justice to everyone . . . if he does, in fact, have a meritorious claim"), 35,128 (remarks of Rep. Sieberling) ("meritorious . . . deserving cases") (1976).

[116] 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney) ("act would do nothing to encourage frivolous litigation").

[117] *Furtado v. Bishop*, 84 F.R.D. 671, 677 (D. Mass. 1979) ("There must be an element of reason; the fee must not be such as to encourage the overpressing of marginal claims"), *rev'd*, 635 F.2d 915 (1st Cir. 1980); H.R. Rep. at 6-8.

[118] S. Rep. at 5; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419-20 (1978).

[119] *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274, n. 6 (1983).

[120] Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 375 (1980).

[121] Leubsdorf, *supra* at 488-89.

Finally, to the extent that contingency bonuses are intended to protect plaintiffs' counsel against the risk of nonpayment for their services, such bonuses are particularly inappropriate where plaintiffs are represented by a legal services organization that never receives payment from its clients and whose funding is not contingent on whether it prevails in individual cases. Such attorneys "cannot truly be said to have undertaken a risk of no remuneration." 126/ As aptly stated by one commentator:

> If an organization is not permitted to charge its clients for its services . . . what does that organization *risk* in undertaking representation in one of the few types of cases which permit recovery of a fee? . . . [L]itigation which permits the collection of a fee by a federally funded legal

---

122/ *See, e.g.*, *City of Detroit v. Grinnell Corp.*, *supra* at 471 ("[t]he greater the probability of success . . . the less this consideration should serve to amplify the basic . . . fee"); *Prandini v. National Tea Co.*, *supra* at 1020.

123/ Leubsdorf, *supra* at 488-89.

124/ *See, e.g.,* 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott) (Act will help eradicate discrimination); S. Rep. at 5 ("fee awards . . . secur[e] compliance with [civil rights] laws"); *Copeland III*, *supra* at 896.

125/ Rowe, *supra* at 656, 676 n. 115; Leubsdorf, *supra* at 490; Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, *supra* at 375; *Hughes v. Repko*, 578 F.2d 483, 491 (3rd Cir. 1978) (Garth, J., concurring).

126/ *Vecchione v. Wohlgemuth*, *supra* at 795.

services organization is actually the most lucrative type of litigation available to such organizations.[127]

Nor can contingency bonuses to legal services attorneys be justified on other grounds. Such bonuses cannot operate as an incentive for such groups to take more civil rights cases,[128] since an Internal Revenue Service ruling prohibits public interest law firms seeking tax-exempt status from "us[ing] the likelihood or probability of a fee award as a consideration in its selection of cases."[129] Futhermore, no additional incentive is needed to induce such organizations to take on such cases, since "[t]hese organizations exist to represent groups like the [plaintiff] class, with constitutional claims at the cutting edge of the law."[130] Nor should contingency bonuses be used as an indirect means of funding legal services organizations.[131] This Act was not intended for that general purpose,[132] but rather, only to finance successful civil rights cases, and there is no guarantee that bonuses received by legal services organizations will be used for that limited purpose. Thus, contingency bonuses to legal services attorneys, which serve none of the purposes of § 1988, must be characterized as impermissible windfalls to such organizations.

Other rationales, in addition to contingency, used by the courts to justify bonus awards include the complexity of the case and the quality of the services provided by plaintiffs' counsel. Since the complexity of the case increases the number of hours reasonably spent, and the quality of representation increases the reasonable hourly rate used to compute the lodestar amount, a bonus supplementing the lodestar based on the factors necessarily constitutes a windfall, which should be disallowed.[133]

---

[127] Comment, Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976, 13 J. Mar. L. Rev. 331, 369-70 and n. 189 (1980). See also Rowe, supra at 670.

[128] Cf. Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978).

[129] Rev. Proc. 75-13, § 3, 1975-1 Cum. Bull. 662.

[130] NYSARC v. Carey, 711 F.2d 1136, 1154 (2d Cir. 1983).

[131] Compare Copeland III, supra at 899 with id. at 920 n. 32 (dissent).

[132] See Comment, Calculation of a Reasonable Award of Attorneys' Fees, supra at 362-63, 395.

A bonus based on benefits obtained by the plaintiffs in the underlying case is also contrary to the purposes of the Act and unfair to the defendants. The basic fee award is designed to compensate plaintiffs to whatever extent that they prevail.[134] A party who fully prevails will receive compensation for all time reasonably spent in doing so and, accordingly, will receive a higher fee than one whose success is limited.[135] An additional bonus for success can only constitute a windfall. Moreover, the amount of a bonus based on results is likely to be arbitrary, particularly in nonmonetary cases where the results are difficult to translate into quantitative terms.[136] Finally, a court that has just ruled in plaintiff's favor might be inclined to reemphasize the importance of its ruling by rewarding plaintiff again, by way of a bonus, for his "outstanding" success. Such a bonus is unfair to defendants, since they have already "paid" for the results of their wrongdoing via the relief awarded against them on the merits. To "punish" them again by supplementing the fee award is contrary to the compensatory, nonpunitive purpose of the Act. Eliminating such bonuses would eliminate this subjective element of fee awards.[137]

For all of the reasons discussed above, bonus awards are inconsistent with the purposes of § 1988. Rather than merely compensate plaintiffs' counsel for their legal expenses in prosecuting a particular civil rights case, all that the Act intended, bonus awards constitute windfalls to plaintiffs' counsel, a result that Congress expressly intended to avoid. Therefore, Congress should amend the Act to prohibit the use of bonuses or multipliers in computing a fee award.

133/ See Leubsdorf, supra at 487; Berger, supra at 317-38.

134/ See Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983).

135/ Id.

136/ Berger, supra at 316.

137/ Id. The purpose of this and other recommendations contained in this report is to make the process of awarding fees more objective. If these recommendations are implemented, courts would be liberated from engaging in this unnecessarily subjective process, since more claims for fees could be settled and those that reached the courts could be resolved by the application of objective and easily applied criteria.

Recommendation No. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

Finding No. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual costs of the litigation.

In computing a "reasonable" attorney's fee for prevailing counsel, most courts have applied the market rates charged by private law firms to their fee-paying clients, even where the attorney seeking fees has not actually incurred the high costs ordinarily associated with private practice. For example, in a case now pending before the District Court of Massachusetts, a law professor employed by Harvard University at an annual salary of $70,000 and having minimal overhead expenses seeks to be compensated at the rate of $275 per hour (plus a bonus of 50 percent), a rate higher than those charged by even the most high-priced private firms in the area.[138]

In *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980), attorney's fees were awarded in four civil rights actions in which a non-profit legal aid society, partially funded by the state of Hawaii, represented the prevailing plaintiffs. The Ninth Circuit specifically rejected the argument that the legal aid society should be reimbursed only for its actual costs in litigating the case. Rather, the court concluded that the fee award should be based upon rates charged by private Honolulu attorneys. Similarly, in *Stenson v. Blum*, No. 81-7385 (2d Cir.), *cert. granted*, 103 S. Ct. 2426 (1983), the Second Circuit affirmed an award of fees to a publicly-funded legal services organization, at the rate of $95 to $105 per hour, "the rate[s] charged for similar work by [private] attorneys of like skill in the area." Those cases are not atypical.[139] However, as a few courts and commentators have recognized, awarding fees to legal services attorneys at "market"

138/ *Grendel's Den v. Larkin*, No. 77-3418-T (D. Mass.). *See also* *Johnson v. Snyder*, 470 F. Supp. 972 (N.D. Ohio 1979); *Pugh v. Rainwater*, 465 F. Supp 41 (S.D. Fla. 1979); *Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977), *aff'd mem.* 573 F.2d 1301 (3rd Cir. 1978) (fees awarded to law professors at "market" rates).

139/ *See also, e.g.*, *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978).

rates "constitute[s] a substantial windfall for the organizations involved" and therefore should not be permitted under § 1988.[140]

A proper determination of what constitutes a "reasonable" hourly rate for legal services attorneys must begin with an examination of the language of the Act and its legislative history. The Act itself provides some guidance by authorizing the award of "a reasonable attorney's fee *as part of the costs*." The legislative history also repeatedly equates attorney's fees with the costs of litigation and emphasizes that the Act is intended to reimburse plaintiff's counsel for the "cost" of vindicating plaintiff's civil rights in court.[141]

The legislative history further indicates that the Act was intended primarily to encourage *private* attorneys to take civil rights cases,[142] although the House Report indicates, in a footnote, that "a prevailing party is entitled to counsel fees even if represented by an organization."[143] Thus, the legislative history falls far short of mandating that legal services attorneys be compensated at "market" rates. Moreover, even if Congressional endorsement of the market-rate system could be inferred from the legislative history, the escalating rates that have resulted from its application require a reexamination of that system in light of the overall purposes of § 1988.[144]

---

[140] *NYSARC V. Carey*, 711 F.2d 1136 (2d Cir. 1983). *See also Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Copeland III*, 641 F.2d 880 (D.C. Cir. 1980) (Wilkey, J., dissenting); *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978) (*Copeland I*); *Greenspan v. Automobile Club*, 536 F. Supp. 411 (E.D. Mich. 1982); *Glover v. Johnson*, 531 F. Supp. 1036, 1039-44 (E.D. Mich. 1982); *Page v. Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979); *Alsager v. District Court*, 447 F. Supp. 572, 577-80 (S.D. Iowa 1977); Comment, *Calculation of a Reasonable Award of Attorney's Fees Under Attorney's Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 378-400 (1980).

[141] 122 Cong. Rec. 31,471 (remarks of Sen. Mathias), 31,472 (remarks of Sen. Kennedy), 35,118, 35,128 (remarks of Rep. Sieberling), 35,126 (remarks of Rep. Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6. *See also Alsager v. District Court*, *supra* at 577 ("Nothing . . . indicates that the purpose of the statute was other than *reimbursement* for costs and time spent."); *Page v. Preisser*, *supra* at 402-03.

[142] *See* H.R. Rep. at 2-3.

[143] H.R. Rep. at 8 n. 16.

What the legislative history does unequivocally demonstrate is Congress's intent that, however fees are computed under the Act and to whomever they are awarded, the amount of such fees should not be such as to constitute a windfall to prevailing counsel.[145] A close examination of the market-rate system of computing hourly rates for legal services attorneys reveals that it is contrary to that clear legislative intent.

As a few courts and commentators have recognized, assigning "market" rates to legal services attorneys presents difficult, if not insurmountable, problems. First of all, to state the obvious, there is no true "market" for the services of legal services attorneys, since they receive no fees from their clients. Particularly since minimum fee schedules may no longer be used,[146] rates vary widely within communities and even within individual law firms,[147] depending on factors having no necessary relationship with the value of the services rendered or the experience and skill of the attorneys involved, for example, the attorney's relationship with a particular client, what that client can afford to pay, the firm's overhead expenses, and how much profit the firm desires to make.[148] Since such factors are unrelated to the value of a legal services attorney's services in a particular case, assigning such an attorney a rate based on these factors is patently unreasonable and inconsistent with the legislative purpose of compensating civil rights attorneys only for the value of their services in a particular case.

More significant, in light of Congress's clear intent to avoid windfalls, is the fact that rates determined in this manner are likely to far exceed the legal service organizations' actual costs, since such rates are computed on the basis of the high overhead expenses and profit margins of private firms, which are not shared by legal services organizations. [149] Any such excess is obviously a windfall to such organizations. [150] Particularly where the party paying the fee is a state government, "the difference, if any, between the 'market value' fee and the 'compensation' fee would be better spent in remedying [the civil rights violation that gave rise to the action]." [151]

---

[144] See Copeland III, supra at 908, 910 (dissent) ("path of attorney's fees [under market-rate system] . . . is Up, Up, and Away ! . . . [S]pecific situations which arise in future cases will sometimes bring to light deficiencies in the general rules laid down in the past . . .").

[145] See H.R. Rep. at 9; S. Rep. at 6.

[146] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[147] See Copeland III, supra at 910 n. 3, 924 (dissent) (" 'going hourly rate ' . . . is itself an artificial construct").

[148] Comment, Calculation of a Reasonable Award of Attorney's Fees, supra at 385; Copeland III, supra at 914, 924-25 (dissent).

Although the market-rate system may have been adopted in order to avoid treating legal services organizations any differently from private attorneys, [152] that system, in effect, gives such publicly-funded counsel an unfair advantage over their private counterparts. As noted by one commentator:

> Requiring district courts to award identical gross fees to private and organizational counsel, notwithstanding the greater litigation expenses incurred by private counsel, would effectively award a higher return of profit to organizational counsel. Such a rule would lead a court to arbitrarily increase an otherwise reasonable award of attorney's fees simply because plaintiff's counsel happened to be employed by a legal services organization. [153]

Such disparate treatment is not only unfair to the litigants on both sides of civil rights cases, but is also directly contrary to "the spirit of 'reasonableness' which is the heart of section 1988. . . . Legal services organizations, along with their counterparts in private practice, are not entitled to anything more than a reasonable fee under section 1988."[154]

---

[149] See NYSARC v. Carey, supra at 1150.

[150] Such a windfall cannot be justified as enabling legal services organizations to undertake other civil rights cases, cf. Palmigiano v. Garrahy, 616 F.2d 598, 602 (1st Cir.), cert. denied, 449 U.S. 839 (1980); Copeland III, supra at 899, since the Act was not intended to serve that purpose, however benevolent.

[151] Glover v. Johnson, supra at 1044.

[152] See, e.g., Palmigiano v. Garrahy, supra at 601.

[153] Comment, Calculation of a Reasonable Award of Attorney's Fees, supra at 398.

In order to avoid windfalls to legal services attorneys, a few lower courts have adopted an alternative method of computing hourly rates for legal services organizations, based on the actual litigation expenses of such organizations. Rather than arbitrarily assigning "market" rates to such attorneys, hourly rates are computed according to the hourly wages of the attorneys involved plus the percentage of the annual overhead of the organization attributable to the number of hours reasonably spent by the organization's attorneys on the case.[155]

This cost-based method has the advantages of more accurately reflecting the actual costs of vindicating a plaintiff's rights in a particular case, without compensating plaintiff's counsel for overhead and other expenses not actually incurred.[156] Such a system is consistent with the factors enumerated in Johnson v. Georgia Highway Express and endorsed by the Congress. An individual attorney's salary presumably reflects his relative skill and experience within the organization.[157] Other pertinent factors, such as the novelty and complexity of the case, would still be reflected in the court's consideration of the number of hours reasonably spent. Moreover, it must be remembered that the Johnson criteria were intended only as guidelines and were not meant to be applied so as "to make the prevailing counsel rich.[158]

In addition, a cost-based system is actually easier to administer than the more subjective and essentially arbitrary market-rate system.[159] The information needed to compute rates on this basis, i.e., attorneys' salaries and organizational overhead, is readily available, since legal services organizations are required under the Legal Services Corporation Act [160] to report such information as a condition to their receipt of federal funding. By contrast, under the market-rate system, prevailing counsel have the substantial burden of producing detailed and case-specific affidavits from community lawyers of similar experience and other expert testimony in order to establish an appropriate market rate for their services. [161] Furthermore, the objectivity of such information will facilitate settlement of fee claims by such organizations.

---

[154] Id. at 395.

[155] See NYSARC v. Carey, supra at 1150-52; Glover v. Johnson, supra at 1044; Alsager v. District Court, supra at 579; Page v. Preisser, supra at 402.

[156] See Page v. Preisser, supra at 401.

[157] Rodriguez v. Taylor, supra at 1248.

[158] Johnson v. Georgia Highway Express, 488 F.2d 714, 719 (5th Cir. 1974).

[159] See Copeland III, supra at 925-28 (dissent).

In sum, a cost-based system for determining reasonable hourly rates for legal services attorneys is consistent with the language and intent of the Act and is certainly preferable to the subjective and inflationary market-rate analysis currently applied by most courts. Under a cost-based system, legal services attorneys would receive full compensation for the cost of vindicating their clients' rights. They should not and cannot reasonably expect to receive more. Accordingly, Congress should amend the Act to provide that fee awards to salaried publicly-funded attorneys be computed on the basis of their actual costs.

> **Recommendation No. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.**

---

[160] 42 U.S.C. § 2996h (c) (1); 45 C.F.R. § 1602.

[161] See Berger, supra at 324; Comment, Calculation of a Reasonable Award of Attorney's Fees, supra at 385; National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1325 (D.C. Cir. 1982) ("Setting a prevailing hourly rate has proven more difficult than perhaps may have been contemplated.").

Finding No. 9: The Fees Act affects the process of legal dispute resolution in a way that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

C. making it less desirable, once litigation is underway, for public defendants to alter challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

Throughout this report, a recurring theme has been the adverse effect of various aspects of the Fees Act, as interpreted and applied by the courts, on the process of settling disputes. Because of the courts' liberal construction of "prevailing party" combined with their rejection of virtually all circumstances justifying the denial of fees, plaintiffs with any colorable claim are encouraged to commence suits, rather than attempt to resolve disputes informally, and to continue to litigate every claim, secure in the prospect of a substantial fee award as long as they prevail on any issue or succeed in obtaining some benefit after the commencement of litigation. Moreover, the longer the litigation continues, the higher the award the plaintiffs can expect to receive.

Conversely, defendants are discouraged from informally resolving disputes for fear that their actions will confer prevailing party status on the plaintiffs, virtually guaranteeing liability for fees. Public defendants are discouraged, however, from litigating cases where they have a strong defense, since in such cases, if plaintiffs ultimately prevail, defendants are forced to pay for both sides of the litigation plus a "contingency bonus" based on plaintiffs' high risk of loss.

Furthermore, because of the absence of uniform standards for calculating a "reasonable" fee award, plaintiffs and defendants have difficulty settling fee claims without litigation. Plaintiffs are further encouraged to litigate their claims for fees, since the cost of fee litigation is also charged to the defendants.

The net result of these incentives and disincentives is to deter plaintiffs from settling meritorious cases but to encourage defendants to settle close cases where they have a strong, but possibly unsuccessful, defense. Many of the foregoing recommendations, if adopted by the Congress, would partially alleviate these skewed and undesirable effects of the Act. However, in order to further encourage settlement, where appropriate, and thereby reduce unnecessary litigation, to the mutual benefit of all parties and the courts, additional reforms are necessary.

In order to encourage pre-litigation settlement, plaintiffs should be precluded from receiving fees where it can be shown that the litigation was commenced primarily for the purpose of obtaining attorney's fees. [162/] Such a denial would be warranted where, for example, plaintiffs made no attempt to resolve the dispute informally prior to litigation or filed suit despite defendants' willingness to settle the matter informally.

Once litigation is commenced, settlement could be encouraged by precluding an award of fees to plaintiffs who reject an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure and subsequently obtain a less favorable judgment from the court. Although some courts have construed Rule 68 to require the

---

[162/] *Cf., e.g.*, 42 U.S.C. § 3612(c), precluding an award of fees where the lawsuit is "brought principally for the purpose of gaining attorney fees."

denial of attorney's fees in such circumstances, [163] other courts have disagreed. [164]

The denial of fees incurred after the rejection of a settlement offer that turns out to be more favorable than the relief eventually obtained from litigation would "work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation." [165]

> **Recommendation No. 9: The Congress should amend the Fees Act to provide that the court shall deny attorney's fees to a prevailing party, where it determines:**
>
> **A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or**
>
> **B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.**

---

[163] See, e.g., Fulps v. City of Springfield, 715 F.2d 1088, 1092 (6th Cir. 1983); Waters v. Heublein, Inc., 485 F. Supp. 110, 113 (N.D. Cal. 1979); Jones v. Federated Department Stores, Inc., 527 F. Supp. 912, 920-21 (S.D. Ohio 1981); Scheriff v. Beck, 452 F. Supp. 1254, 1259 (D. Colo. 1978). See also, Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889, 899-90. A proposed amendment to Rule 68 is presently being considered, which would expressly provide that fees should be denied in such circumstances. 98 F.R.D. 361-67 (1983).

[164] See, e.g., Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983); Greenwood v. Stevenson, 88 F.R.D. 225 (D. R.I. 1980).

[165] Waters v. Heublein, Inc., supra at 114-15; see also Committee Note to Preliminary Draft of Proposed Amendment to Rule 68, 98 F.R.D. at 366 (1983).

CONCLUSION

The Association's recommendations are designed to further the original purposes of the Fees Act while eliminating some of the serious problems that have arisen from its application. In general terms, the major problem with the Act, as presently implemented by the courts, is the lack of uniform and easily applied standards of determining eligibility for fees and for computing the amount of a reasonable fee in particular cases. Absent such standards, state and local governments are faced not only with high and occasionally exorbitant fee awards, but also with the burden and expense of opposing excessive and unjustified claims for fees. Without clear standards, such opposition inevitably takes the form of complex and protracted litigation over fees, which further saps the resources of state and local governments, to the detriment of all parties, the courts, and ultimately, the public, the Act's intended beneficiaries. Legislative reform, along the lines recommended by the Association, is therefore urgently needed.

ABOUT THE ASSOCIATION

The National Association of Attorneys General was founded in 1907 for the purpose of fostering communication of legal developments and cooperative legal actions among the states' chief legal officers and their staff attorneys.

The Association staff compiles and disseminates information on legislative, agency, and judicial developments that have an impact on state legal affairs, and provides research and technical assistance to the offices of Attorneys General. The Association handles hundreds of information requests each month from the offices of Attorneys General, members of Congress, officials of the federal government, and the public. Information clearinghouses are maintained in ten substantive areas: antitrust, commerce, consumer protection, charitable trusts and solicitations, bankruptcy, criminal justice, corrections and institutional confinement, energy, environment, and medicaid fraud. In addition, the Association has been fortunate to obtain under the Intergovernmental Personnel Act (IPA), the services of two senior attorneys from the Department of Justice to assist state Attorneys General in the areas of management and information systems, and Supreme Court advocacy.

The Association operates an extensive continuing legal education program in numerous substantive law areas attended by Attorneys General, Assistant Attorneys General, and other state and local government officials.

The Association publishes five monthly reports of significant state and federal legal developments and legislative activities, as well as A-G Report, which focuses on the activities and responsibilities of Attorneys General. These publications are available to the bar and the public.

The full Association meets twice yearly, in June and in December, at which time it receives reports and recommendations from the committees and subcommittees, and thereafter debates and decides what action the Association shall take on litigation, legislation and policy issues. The autonomy of each Attorney General is carefully protected and the influence of the Attorneys General working together within the Association is targeted at those issues on which there is unanimous or nearly unanimous support.

The Association's staff works with numerous committees and subcommittees of the Congress in implementing the Association's policy positions by coordinating testimony of Attorneys General and providing such committees with the views of the Association on particular issues. In addition, we work closely with numerous state, local, and other associations on national issues of mutual concern.

Each spring, Attorneys General meet in Washington, D.C., with the President, Vice President, U.S. Attorney General, and chiefs of the antitrust, civil rights, criminal, and lands and natural resources divisions of the Department of Justice, the Chief Justice of the United States, House and Senate Judiciary Committee chairmen, and other key members of the Administration and Congress.

There are seven former Attorneys General who now serve in the Congress. Senator Jeff Bingaman (D-N.M.) was elected in November 1982 and joins Senators Slade Gorton (R-Wash.), Warren Rudman (R-N.H.), John Danforth (R-Mo.), Thomas Eagleton (D-Mo.), and Robert Stafford (R-Vt.), as well as Rep. Jim Jeffords (R-Vt.).

There are 10 Governors who are former Attorneys General: Governors Richard Bryan (D-Nev.), George Deukmejian (R-Calif.), Toney Anaya (D-N.M.), Mark White (D-Tex.), and Bill Clinton (D.-Ark.), William Allain (D-Miss.), William Brennan (R-Me.), Bruce Babbitt (D-Ariz.), Alan Olson (R-N.D.), and William Janklow (R-S.D.).

Senator HATCH. Well, thank you, General Bellotti. Without objection, we will place immediately before General Bellotti's statement an article written by former Assistant Attorney General Jonathan Rose for the Legal Times, entitled "Reform of Civil Rights Fee Award Practices." This was last February that he wrote it. And he notes that awards based on prevailing firm rates generally focus on the fee that the top lawyers in an area can command rather than on the fee that is sufficient to attract competent counsel. We will place that in the record, and, second, in a recent Supreme Court case, several intervenors had filed petitions on the side of the city defendant, alleging that constitutional rights would be abridged if the city's abortion ordinance were struck down. When the city's ordinance was declared unconstitutional, these intervenors were assessed substantial attorney's fees for joining the case on the side of the losing city. I have recently received material protesting the assessment of attorney's fees against an intervenor who was asserting his own constitutional rights.

So, without objection, we would ask that my comments and these particular matters be placed in the record immediately before my calling of these witnesses to the witness table.

At this time we will turn to the distinguished attorney general from my own State of Utah. We are really happy to have you here with us today—but I am going to have to leave right in the middle of your comments, I am afraid, and I hope you will forgive me for that.

STATEMENT OF DAVID L. WILKINSON

Mr. WILKINSON. I understand. I appreciate very much, Senator, and it is certainly a personal privilege for me to be invited to join General Bellotti and General Clark, for whom I have the greatest respect. I assume I may submit for the record my prepared statement, which I will not read.

You noted, Mr. Chairman, that I did testify here about 2½ years ago before this same subcommittee, and it was the same two Senators who are here now who were here then, and that reminds me of a story involving a prominent Utahan who was the first Utahan to serve in the Cabinet of a President of the United States, the former Secretary of Agriculture, Ezra Taft Benson. It seems that when he was Secretary of Agriculture he received an invitation to speak to an agricultural cooperative, and when he learned of it through his staff he said "I have spoken to that group before, go back and find out if they still want me to speak to them." And a few days later his aide came into him and said "I checked and they have checked, and, sure enough, you went there several years ago, but they have checked around and nobody can remember what you said, so please come ahead."

[Laughter]

Senator HATCH. Well, I want to assure you that we remember what you said.

There is another reason for you testifying here today. I think it's very unique that we have attorneys general from the Northeastern part of the United States, Massachusetts, the Central part of the United States, Arkansas, and the Western part of the United

States, Utah. We have a geographical balance here and a uniformity and accord that I think is very important for the American people, for members of this committee, and others to understand. I doubt that there is much real difference among the opinions of the various attorneys general on this particular subject.

So even though I have to leave early, we are going to read your testimony.

Mr. WILKINSON. That's a good point, Mr. Chairman, and I should say that we not only have geographical balance, but we certainly have political balance. I am sure that General Bellotti would agree that his views bear the same relationship to my views usually as the views of his good friend, Senator Kennedy, bear to those of my good friend, Senator Hatch.

Senator HATCH. I think that's been well-spoken.

Mr. WILKINSON. For the benefit of Senator DeConcini, who also has to leave in just a moment or two, I would like to refer to two pages of written comments by my esteemed friend, Gen. Robert Corbin, of his State, who unfortunately could not be here today. These two pages are, I understand, already on the record, but I would like to just read several paragraphs of them, and then make sure that you all get copies of this two-page statement. The two-page statement is part of earlier (1982 or 1983) testimony on an earlier (Hatch?) bill. I have since lost my copy of Arizona Attorney General Corbin's statement.

He says:

> The undue liberalizing of civil rights laws has become mind-boggling. Any State statute or regulation, even in the area of commerce, may now be attacked as a civil rights violation. Conceivably, General Motors can allege a civil rights violation when a state law restricts its franchises. Giants in oil industry can complain of civil rights violations when a state regulates gas stations. In the end, all these plaintiffs will seek attorney's fees from the state under the 1976 Civil Rights Attorney's Fees Awards Act. Congress could not have intended this result when it enacted the Civil Rights Act shortly after the Civil War; Congress did not intend this result in 1976 when it enacted the Act.

And then in another paragraph General Corbin said—and this is one of my key points:

> It is not uncommon in a close case for the defendant to capitulate early in order to minimize the attorney's fees liability. An undesirable result of this capitulation is that legitimate questions concerning serious constitutional issues may never be definitively adjudicated by our appellate courts. One way to remedy this problem is to provide that attorney's fees should not be awarded if the court finds that the state's conduct is in good faith.

Unfortunately, most of these section 1983 cases that result in 1988 attorney's fee awards are in the cutting edge of the law, and one does not know, until the case has been fully adjudicated all the way up to the Supreme Court often, whether an actual right is involved.

Now, Senator DeConcini, you said at the outset that you might want to work for a bill that would be better in your point of view for the coming session. I certainly, speaking for myself, don't want to say that this is the only bill that would improve the present situation: I like this bill; if it were up to me, I would do it a little bit differently—but one idea I have toyed with, I certainly think that we need to vindicate basic, fundamental civil rights by a mechanism similar to section 1988. And I have no problem paying more than $75 'perhaps way more than $75, to vindicate basic, fundamental civil rights.

But where my problem is, and the problem of every attorney general in this country, is that most of these cases do not involve basic, fundamental civil rights. Most of them are like the celebrated case where, in order to get a liquor license for a restaurant, an attorney ran up fees which he is now claiming of well over $300,000 at $275 an hour. I don't think that was in the minds of Senator Tunney, Senator Kennedy, and Congressman John Anderson back in 1976 when they voted in favor and spoke in favor of this bill.

General Bellotti has mentioned his desire, and I think we would all share this, that in close cases, if we could build into the bill that where there is a substantial justification in taking the position, that is, where the State is justified by taking the position that it does—because it is a close question, because it has not yet been litigated—then, in that case, attorney's fees should not be awarded against the State, or should be awarded in a much lesser amount. Otherwise you have a chilling effect; otherwise, as General Corbin has noted, you have the State capitulating, feeling it just isn't worth the risk of getting hit with a $200,000 or $300,000 award to defend tht particular point.

Senator HATCH. If I could interrupt you for 1 second, we did call around the country and ask in various areas what their attorney's fees would basically be. We found an average range of something less than $90 an hour, and many of them were less than $75 an hour. Now, we didn't call every jurisdiction, but we are finding that $75 an hour is certainly not out of line.

It's interesting to see the figures that the deputy attorney general has brought with her. I would like you gentlemen to really study those figures and see what you think about that, because we are not locked in concrete here, we want to do what is right, and your testimony particularly, along with the American Bar Association testimony, and others, is very important.

If I could just interrupt you for 1 more second, I need to go down and start that other hearing.

Senator DECONCINI. I will stay a few minutes.

Senator HATCH. Senator DeConcini can stay, and then, when counsel takes over, I am going to ask counsel to ask extensive questions so that we can get this record as full and complete as we can, and hope that all witnesses will cooperate with counsel in establishing this record today.

Thank you, and we appreciate having you here.

Mr. WILKINSON. Thank you, Senator.

[Senator DeConcini assumes the chair].

Senator DECONCINI. Please proceed.

Mr. WILKINSON. Thank you, Senator DeConcini. I want to stress—and I have done so in a friendly way—that our association, although it does represent all parts of the spectrum, is really behind this: In fact, I think we'd all agree there is no issue on which all attorneys general are more united than on this particular point.

Now, one might say, well, that's understandable because the attorneys general have a special interest to protect, namely, the treasuries of their respective States, and we should look upon the attorneys general who may be left of center as perhaps compromising their own political convictions to protect their State's treasury. I would like to vehemently dispel such a belief, if such a belief is held. For instance, we have, as an association, split quite sharply on a question that could be said to be closely related, and that is the question of the funding of the Legal Services Corporation. One would think that if the only thing that motivates attorneys general is their desire to protect their State treasuries that they would all be in favor of cutting back on the funding of Legal Services Corporation. But that is not the case; in fact, when I first met my good friend, General Bellotti, he and I were on the ooposite ends of this particular issue, and he was supported by the attorney general of Iowa and the attorney general of Vermont—and I hope, Randy, that we would get to the two Senators from those two States, that their attorneys general are very much with us, and all other attorneys general, in saying that something has to be done to cut back on the abuses of section 1988 and other fee-shifting statutes without endangering the vindication of basic civil rights.

I believe I have spoken long enough. I do want to emphasize once more that, in our view, this is not a partisan issue; indeed, there are some very telling comments from the so-called liberal wing of the Supreme Court in a recent U.S. Supreme Court case, the case of *Hensley* v. *Eckerhart*.

Listen for a moment, this will be my concluding quote:

> Ultimately, section 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures which, like a Frankenstein's monster, meanders its well-intentioned way through the legal landscape, leaving waste and confusion (not to mention circuit-splits) in its wake.

That is, of course, by Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens in a case handed down just last year.

Thank you very much.

[The following was received for the record:]

Testimony Before the
Subcommittee on the Constitution
# of the
Senate Judiciary Committee
on the Civil Rights Attorneys Fees Awards Act
of 1976 (42 U.S.C. Section 1988)

by

DAVID L. WILKINSON

Utah Attorney General
September 11, 1984
Washington, D. C.

Distinguished Senators:

I am honored to be invited to testify before this Subcommittee for a second time.

While I appear today with my fellow Attorneys General on behalf of the National Association of Attorneys General, and while I wholeheartedly share the views contained in the Association's recent "Report to Congress on Attorney's Fees Awards," certain of my views go beyond the suggestions in that Report.

The subject of my testimony is dear to the heart of every state, county and city attorney, liberal and conservative across the land. Section 1988, as you know, was passed eight years ago with the well-meaning intention of encouraging lawyers to take cases perceived to be unpopular, in most cases, to protect the most "basic" and "fundamental" civil rights of persons who otherwise might be unable to obtain legal representation. It did this by dangling money in front of the country's lawyers. Its language, unchanged since its passage, is straightforward:

> "In any action or proceeding to enforce a provision of [several U.S. Code sections, including 42 U.S.C. 1983], the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

As every lawyer knows, what began eight short years ago as a well-intentioned attempt to further justice among those least able to afford the legal process, has skidded completely out of control. Since 1976, litigation on eligibility for and computation of attorneys' fees has mushrcomed. West's Annotations to 42 U.S.C. Section 1988 now fill 179 closely-printed pages. A computer search for cases arising under Section 1988 revealed almost 3,000 federal and state decisions as of last December. As noted by Lloyd Cutler, a prominent Washington lawyer and former White House counsel to

President Carter, in his Foreword to a new three-volume treatise on court-awarded attorneys' fees, this Act and other fee-shifting statutes "have created a new field of law that has grown so fast and become so complex that it has baffled the efforts of courts and lawyers to comprehend and apply it." L. Cutler, Foreward to M. Derfner and A. Wolf, Court Awarded Attorneys' Fees (1983).

I do not have the time nor, I suspect, do you have the endurance, to listen to another litany of horror stories growing out of Congress' good intentions. But to those of you who might believe that Section 1988 is loved by liberals, let me read from an opinion of four U.S. Supreme Court Justices which came down just last year:

> "Ultimately, Section 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures which, like a Frankenstein's monster, meanders its well-intentioned way through the legal landscape, leaving waste and confusion (not to mention circuit-splits) in its wake." Hensley v. Eckerhart, 103 S. Ct. 1933-51 (1983).

The four judges who said that are - you guessed it - Brennan, Marshall, Blackmun and Stevens (concurring in part and dissenting in part).

If further proof is needed of the result that Section 1988 is not delighting all liberals of today, the National Association of Attorneys General (NAAG) has a present membership of almost two Democrats to every Republican, and at least some of those Democrats are unabashedly "liberal." Yet every member of our Association has endorsed NAAG's position, set forth in this 50-page "Report to Congress," calling for substantial reform in this area. Indeed, the report itself is co-authored by General Francis X. Belotti of Massachusetts, the current president of NAAG, for whom I have great respect, but whose views bear the same relationship to my views as his good friend Senator Kennedy's views, bear to those of my good friend, Senator Hatch.

I heartily endorse the NAAG report and commend it to you. In my remaining few minutes, let me outline three reasons, in my view (and I go beyond NAAG at this point), Section 1988 should be repealed outright or completely overhauled so as to allow attorneys' fees only in suits to protect well established, basic, civil rights.

First, Section 1988 has been used, and unless abolished or changed as I suggest, shall continue to be used, to fuel rank judicial activism. The case has often been stated well against what General William French Smith calls "government by judicial decree," and I will not restate it here. The impact of Section 1988 upon an activist judiciary, however, has been well stated by Circuit Judge Malcolm Richard Wilkey in a 1984 publication of the National Legal Center for the Public Interest:

> "The opportunities for the courts to create rights and to expand into new fields of endeavor have been greatly enhanced by liberal grants of attorneys' fees under vague delegations of authority by Congress. . . . There is nothing which will swell the courts' calendar like a judicially activist bench dangling the certainty of a comfortable fee before an eagerly litigious bar." Wilkey, Activism by the Branch of Last Resort: Of the Seizure of Abandoned Swords and Purses, p. 8.

The second reason I go beyond my fellow Attorneys General in what I prescribe be done with Section 1988, has to do with my views on federalism. Of the desired balance between the powers of the federal and state court systems, one of the nation's greatest Attorneys General and Justices of the Supreme Court, Robert H. Jackson, said:

> "It is a difficult question, and always will remain a debatable question where, in particular instances, federal due process should step into the state court proceedings and set them aside. When the state courts render harsh or unconsidered judgments, they invite this power to be used. But I think in the long run, the transgressions of liberties by the federal government, with its all-powerful organization, are much more to be feared than those of the several states, which have a greater capacity for self-correction."

One of the worst features of Section 1988, as interpreted by the federal courts, in my view, is that it strikes at the very heart of federalism. The awarding of fees has become almost automatic. This is true even where the defendants' refusal to expend funds the federal court felt was necessary resulted from a lack of legislative appropriations; where defendants were compelled by state or local law to engage in the challenged conduct; and where the fee award would have to be paid by a state or local agency and would thereby lessen that agency's ability to provide further services. See NAAG, Report to Congress, page 24.

Finally, the existence of Section 1988 has a chilling effect on state and local officials, further compounding the federalism problem just discussed. Examples abound; every public lawyer can give some. In my state, the ACLU recently complained to the Utah State Board of Education that some public schools were violating the Establishment Clause by permitting school prayer at high school graduation cermonies and by allowing voluntary student discussion of religious subjects on school premises after school hours. As every student of the Establishment Clause will tell you, neither of these practices is clearly proscribed by the First Amendment, and sound constitutional arguments support both practices. Nonetheless, the State Board of Education, not wanting a court battle with the possibility of attorneys' fees being tacked on at the end, directed all school districts in the state to discontinue these practices. Fortunately, most of our school districts ingored this direction. As a footnote, the ACLU has not followed through on its threat to sue, months after our school districts ignored the State Board of Education directive.

In summary, Judge Wilkey was right on when he said:

> "No improvement [in our judicial system] is possible, however, if Congress continues to fan the sporting fever by dangling the prize of attorneys' fees, win, lose, or draw."

OFFICE OF THE ATTORNEY GENERAL
INTERNAL MEMORANDUM

TO: DAVID L. WILKINSON
Attorney General

FROM: PAUL M. TINKER
Deputy Attorney General

DATE: January 24, 1984

SUBJECT: NAAG Report on Civil Rights Attorneys' Fees Awards

This draft report provides further support for my suspicion that the National Association of Attorneys General is largely a paper tiger, too much influenced by the Frank Bellotti's and Stephen Sach's of the world to be very effective in solving real problems for the states. The report demonstrates a considerable amount of research into Section 1988 cases and some of the disparities and inconsistencies of that body of case law as well as some of the practical problems that are posed to the states and local governments, but I believe it falls short of suggesting meaningful reforms.

While each of the nine Findings of the Association (see page 7) is basically true, upon further analysis it is apparent that most of them are only half-truths. Likewise, while the nine Recommendations of the Association (see page 9) are steps in the direction of a solution, most of them would constitute, at best, only a partial solution and in some ways would merely complicate or exacerbate the existing situation. Basically they sound good on paper, but they demonstrate how hard it is to put the genie back in the lamp once he has escaped.

I would fault the Association and the report for being unwilling to tackle the real problem: namely that Section 1988 was fundamentally bad public policy to begin with. The Association carefully avoids taking such a stand, repeatedly enunciating that it favors the purpose of the act merely disagrees how the courts have applied it. It seems to me that until we are willing to meet this fundamental issue head on, we will only encounter different combinations and permutations of the same kinds of problems we are currently dealing with, which the report amply demonstrates.

Unfortunately, Section 1988 is designed to be the engine or the mechanism to fuel fundamental social change in this country by providing the monetary resources for the proponents of social change to win their battles in the courts rather than in the legislatures. When almost every major social policy issue these days can be reduced in one way or another to a basic "equal protection" argument or a "due process" argument under the Constitution, and then litigated in the courts rather than being addressed by the legislature, and when the moving parties can expect the liberal judiciary to analyze their claims in terms of the new substantive due process and rule on "equal protection" or "due process" grounds and then order the defendant state or local government to pay the costs of pursuing the whole matter, our basic system of federalism and separation of powers is fundamentally out of kilter.

I would have no problem with Section 1988 if it were limited to the payment of attorneys' fees in cases where a well established constitutional right was willfully and knowingly denied by a public official or by one acting under color of law. This is not, however, the basic use to which it is being put. It is being used to fund the challenges on the cutting edge of the law to identify new constitutional rights which no one had ever heard of before. Our polygamy case is a classic example. Should Royston Potter prevail, he will undoubtedly be awarded attorneys' fees for his entire case. But why should the State of Utah be assessed attorneys' fees for denying a civil right that has never been a civil right and never will be unless the Supreme Court of the United States suddenly changes its mind and decides that the practice of polygamy is a fundamental right under the so-called privacy doctrine of the Constitution. (Of course, it would be particularly ironic for Utah to have to pay in this case since Utah, alone of all the states, was commanded by the federal government years ago to forever prohibit polygamy.)

Some of these cases on the cutting edge of the law demonstrate that the worst feature of the Section 1988 attorneys' fees provision is that it strikes at the very heart of federalism and at the separation of powers at the state level. It puts the states at an extreme disadvantage in interpreting the Constitution because even if they act in good faith, if they later prove to have been wrong according to a new judicial interpretation, they have to pay. Likewise, the provision as interpreted by the federal courts, fails to recognize the necessity of separation of powers at the state level. For example, in our case of Colyar v. Third District Court a few years ago, the only issue was the constitutional validity of a certain state statute regarding mental health commitments. The legislature which passed the Act was the real party in interest however, the nominal defendant was the Third District Court. The court ruled a specific section unconstitutional. The legislature promptly (in less than ten days) remedied the statute and passed one which would pass constitutional muster. The court however awarded attorneys' fees against Third District Court, (which had no money to pay such a judgment) but the court would not entertain any arguments on our part about the failure of the legislature to provide money to pay the judgment nor was the court willing to bring the legislature before it as a party. This leaves the officials in the executive branch of government (and, in this particular case, also the judicial branch of state government) in a quandary because they are faced with the prospect of violating the orders of one or the other of two co-equal sovereigns. Judge Anderson was ready to hold state officials in contempt if they did not pay the attorneys' fees award in the Colyar case; the legislature was entertaining the idea of making it a criminal offense for anyone in the executive branch of government to pay the award. Executive branch officials, including the attorneys in the Attorney General's office, can gain nothing but frustration and despair from a legal system where the two effective sovereigns, in this case the federal court and the state legislature, simply refuse to recognize each other's existence and/or authority.

These fundamental problems are not addressed in the NAAG report. I sense that many state attorneys general are unwilling to acknowledge that Section 1988, and its underlying jurisdictional basis Section 1983, are indeed the fuel for the engine of social change in this country. They are the mechanism for capitalizing on the existing liberal judiciary to circumvent the will of state and local elected legislative bodies and executive officials. The report in particular fails to recognize that all manner of legal and social issues are now being decided on a constitutional basis. This is particularly frightening where the so-called law of privacy now has an impact on almost every conceivable aspect of moral legislation regarding marriage, sexual behavior, certain crimes of violence, etc. This is the new substantive due process, but it would die almost aborning if it were not for the fueling mechanism of the attorney fee awards under Section 1988. This is the great evil in allowing such awards to be made for cases on the cutting edge of the law i.e. the identification of new, and sometimes previously unthought of, constitutional rights. Again, the use of such a mechanism might be appropriate in cases where a known and established constitutional right is willfully and knowingly violated by public officials.

At a very minimum in order to achieve real reform in this area it seems to me that NAAG needs to go many steps further. Actually only an outright repeal of Section 1988 is in the interest of the states. Failing that, awards must be limited to cases other than liberal social reform cases. Section 1983 itself should be limited to Verified denials of known and existing civil rights by public officials, acting knowingly and willfully and not relying upon heretofore unchallenged state laws or regulations. One of the worst evils of the current system is that the publicly funded Legal Services Corporation and other similar entities evade legislative oversight by achieving their funding through Section 1988 cases even when Congress is attempting to restrict their funding. It is my belief that Section 1988 awards have effectively sustained the Legal Services Corporation through its "seven lean years."

At the very least the Association ought to address the issue mentioned above of executive branch officials being caught in the middle of the battle between two sovereigns and Section 1988 ought to, if kept on the books, require the court to bring the appropriating authority before it when states or state officials are parties so that executive branch officials aren't put in the position of being required to violate state law in order to satisfy federal law. I believe that members of the Association are fundamentally uncomfortable with this approach because they don't really believe in state sovereignty in the same way that we do.

There are a few other minor items that I have noted in the report by marginal notations here and there that you may want to take a look at. Overall, I am disappointed in the report and the position of NAAG and would consider it to be so much sounding brass and tinkling cymbals.

PMT/bab

PREPARED STATEMENT OF KENNETH O. EIKENBERRY

Mr. Chairman and Members of the Subcommittee,

To begin, I'd like to thank the Chairman for holding these hearings today, and affording me, as well as other member of the National Association of Attorneys General, the opportunity to testify in this very important area to the states. Additionally, I would like to express my appreciation to Senator Hatch for introducing S. 584 and S. 585.

While seemingly uncomplex on their face, those bills deal with a problem of increasing complexity facing the states and municipalities, which, if not solved by the Congress, threatens an almost uncontrollable fiscal impact on the states and municipalities. In Parratt v. Taylor, Justice Powell described 42 U.S.C. § 1983 as having "burst its historical bounds." As a result of this judicial bursting, the states and their municipalities cannot look to the courts for any reasonable interpretation of the limits of § 1983.

Furthermore, the Court, in almost each case, points to the Congress as having intended to "grant" a cause of action for damages based on "rights," now purely statutory, which it is inconceivable to me could be encompassed within the intent of the 1871 Congress which originally enacted this law. That, coupled with the absolute unwillingness of an increasing number of courts to exercise any restraint in awarding attorneys' fees under 42 U.S.C. § 1988, has created a situation which only the Congress can now effectively and intelligently deal with. Obviously, this subcommittee recognizes that situation and is willing to deal with it, and I heartily endorse your efforts in doing so.

I know that the time of the subcommittee is limited, and that the attention of the members is naturally focused on other areas of grave significance to this country. I am also aware of the earlier hearings which the subcommittee has held on these bills, and of the general efforts of the subcommittee, and its staff, to fully acquaint themselves with the problems related to the current judicial interpretations of 42 U.S.C. §§ 1983 and 1988, and to settle upon an appropriate Congressional response to the problem. I am sure, for example, that you need no further eludication from me as to the meaning and potential impact of Maine v. Thiboutot. I thus do not intend to engage in any lengthy discussion of the background and the reasons for the problems we are now facing. In that respect, however, I do want to call your attention to a report to the National Association of Attorneys General by its Ad hoc Subcommittee To Study The Effects Of 42 U.S.C. §§ 1983 and 1988, as well as to the Resolution adopted by the National Association endorsing S. 584 and S. 585, and urging the Congress to take appropriate steps to amend §§ 1983 and 1988 for the purpose of alleviating the serious fiscal liability that now confronts state and local governments, which was adopted by the Association at our recent annual meeting.

I understand that both this report and the Resolution have already been made available to the members of the subcommittee, but I am nevertheless submitting them again to you today. I particularly commend the report of our 1983 subcommittee, to your attention, along with the recommendations contained at the conclusion of that report.

I will briefly discuss three of the most recent cases decided by the United States Supreme Court in this area, however, since they both highlight the extent of the problem we are now facing, and because two of those cases prompt, I submit, serious consideration of further amendment to 42 U.S.C. § 1983 not already contained in S. 584 or S. 585.

First, I would like to call to your attention very briefly Middlesex County Sewage Authority v. National Sea Clammers Association, decided by the Supreme Court on June 25, 1981 and reported at 49 Law Week, page 4783. In that opinion is found a very interesting, while extremely disturbing, dialogue between Justice Powell, writing for the majority, and Justice Stevens, writing for himself and Justice Blackman concurring in the judgment but dissenting from a portion of the opinion.

In the majority opinion, Justice Powell engages, sua sponte, in a discussion of the impact of § 1983 on citizens' rights to sue for pollution damages caused by discharges which may or may not be unlawful under the Federal Water Pollution Control Act Amendments of 1972, and for ocean dumping which may or may not have been prohibited by the Marine Protection Research and Sanctuaries Act of 1972. Justice Powell, again even though the parties had not even suggested the existence of the argument, concludes that in 1972 Congress had "foreclosed" any private remedy under § 1983. Justice Stevens, on the other hand, concludes that Congress did not "withdraw" the "express remedy" which it provided to the citizens in originally enacting 42 U.S.C. § 1983. Because Justice Stevens could find no "clear Congressional mandate" to withdraw the § 1983 remedy otherwise available to the citizens, he dissented from that portion of the Court's opinion.

What this all means, of course, is that Justice Powell felt that in 1871, in enacting a law designed to enforce the anti-discrimination laws (an act originally called the Ku Klux Klan Act), Congress might possibly have intended to "grant" to the citizens a cause of action against the states and the municipalities, in federal court, for damages arising out of those states or municipalities dumping sewage twenty miles off the coast of New Jersey. Justice Stevens, on the other hand, seems absolutely certain that Congress in 1871 intended to grant such a cause of action, and that the Congress, 101 years later, did not provide the courts with any "clear mandate" to withdraw that express right. The suggestion that Congress originally intended to create such a statutory cause of action, and that such actions on the part of the states and municipalities, and their officers and agents, might have been within the ambit of the original 1871 Civil Rights Act, is simply, in my judgment, ludicrous. The mere fact that such a dialogue could have taken place in an opinion rendered by the Supreme Court leads me to conclude that the states and their political subdivisions simply can no longer rely on the Court to provide any real moderating effect in this area, and it is now time for Congress to act, and to provide the Court with the "clear mandate" which it appears to be seeking.

Secondly, the Court's decision in Parratt v. Taylor, decided May 18, 1981 and reported at 49 Law Week, page 4509, prompts, in my judgment, a need for a further amendment to § 1983. In that case, the Court held that a Nebraska inmate, whose $23.50 hobby materials had been negligently lost by the officials of the Nebraska Penal and Correctional Complex, did not state a cause of action under 42 U.S.C. § 1983; not because no right of action based on negligence came within the statute, but because his property had not been denied "without due process" in view of the fact that the State of Nebraska affords the prisoner potential relief under its Tort Claims Act. The disturbing holding, of course, of that case is the one just alluded to. That is, the Court has concluded that when an individual is "deprived of property" because of the negligent, unintentional, nonwillful actions of the officers or agents of a state or political subdivision, that negligence could give rise to a federal cause of action for damages, along with the now virtually automatic award of substantial attorneys' fees under 42 U.S.C. § 1988, unless the state or political subdivision affords that individual due process through some statutory availability of a remedy.

When viewed in that light, for example, it becomes clear that the Court may indeed have, perhaps inadvertently, rendered unconstitutional any attempt on the part of the states to limit their liability through the exercise, or reimposition, of sovereign immunity. If, for example, the State of Nebraska had determined, in the management of its own fiscal affairs, to withdraw from its inmates the right to sue the state for damages because of the negligent acts of the prison authorities, any "deprivation of property" arising out of such negligence not only falls within the ambit of the Fourteenth Amendment, but also within 42 U.S.C. § 1983. Again, I submit that such a suggestion with respect to a statute originally enacted to enforce the post-Civil War anti-discrimination laws is simply absurd. For that reason I now urge the subcommittee, and Senator Hatch, to further amend § 1983, by adding appropriate language to S. 584 making it clear that a cause of action exists only for the wilful and intentional actions of the states, political subdivisions, and their officers, agents or employees.

At the conclusion of this statement, I will provide language which in my view achieves that result.

Thirdly, I am heartened by the Supreme Court's June 26 decision in City of Newport v. Fact Concerts, Inc., 49 Law Week, page 4860. In that case the Court held that municipalities themselves were not subject to punitive damages under § 1983. That does not solve the entire potential problem in this area, however. It is not at all clear from that opinion that an individual municipal officer, or state officer for that matter, acting pursuant to state law, would not be subject to punitive damages under that section.

We all here know that except in the rarest of circumstances, the states and cities and counties of this country undertake to immunize their officers and employees from these damages by defending and paying judgments entered against their officers for conduct undertaken in the official performance of their duties. It will be a small comfort to my state, for example, if when the treasurer is required to execute a warrant in favor of some successful private litigant for exorbitant punitive damages, for me to explain to him that the State of Washington itself really did nothing wrong. Thus, I again suggest a further refinement of the amendments to § 1983 to clearly preclude the award of any punitive damages against any defendant, be it the state, a municipal or an officer or employee thereof.

It has come to my attention that certain opponents of this legislation have taken the position, apparently in testimony before this subcommittee given on July 8, that after the Middlesex County case, coupled with Pennhurst State School v. Halderman, decided by the Supreme Court on April 20, 1981 and reported at 49 Law Week, page 4363, § 1983 does not pose the same threat to the fiscal integrity of the states and their political subdivisions as may have previously been suspected. The suggestion was made, for example, that after the Middlesex County and Pennhurst cases, a "two-tiered" test has now been established by the Supreme Court before any plaintiff can demonstrate his or her right to relief under that section. Their position apparently, as I understand it at least, is that a litigant must now show not only that the statutory scheme involved was of the kind that created enforceable "rights" under § 1983, but also that Congress had not foreclosed private enforcement of that statute by the enactment of a separate enforcement scheme in the statute itself.

Simply put, I do not subscribe to the suggestion that in the Middlesex County and Pennhurst cases the Supreme Court has so limited the application of § 1983 as to solve the problems facing the states and its municipalities.

If the same court can find, for example, that the negligent loss of $23.50 worth of hobby materials by prison authorities and inmate workers in a mail room constitutes such a deprivation of property as to give rise to a 42 U.S.C. § 1983 cause of action, then I do not feel confident in relying upon the Court's further ability to moderate the impact of this statute. Understandably, I also submit that this subcommittee, and the Congress, should not so rely either.

Two final points with respect to § 1983. They concern the appropriate scope of that act, when again viewed in its historical context.

We can all agree that § 1983 was originally enacted by the 1871 Congress to enforce the anti-discrimination laws and constitutional protections of the post-Civil War era. Indeed, for 109 years it was generally assumed that "and laws" meant laws intended to enforce the constitutional freedoms of the citizens. Yet, in *Thiboutot*, the Court decided that phrase included the Social Security Act, a law enacted pursuant to Congress' power *under the Commerce Clause*. And therein lies the rub!

In order to get § 1983 back where it belongs, as a statute designed to allow citizens to protect their cherished Fourteenth Amendment freedoms, Congress should promptly, and explicitly, remove from its ambit any laws enacted pursuant to the Commerce Clause, or Congress' general spending power. I am satisfied S. 584 is intended to do just that. I simply suggest that that be made inarguably clear, perhaps by the inclusion in the committee report of appropriate language to that effect.

It seems also clear to us that the courts are confusing two entirely separate concepts: Having a cause of action for damages under § 1983, and *access* to the federal courts. General federal court § 1343 type jurisdiction would still exist, for example, if § 1983 were repealed entirely. Ms. Thiboutot could have obtained a mandatory injunction, from the federal court, ordering the State of Maine to pay her the benefits to which she was entitled, if § 1983 had never been enacted. What she would not have been able to obtain, and will not, if this legislation is enacted, is damages, and an award of attorneys' fees of several thousands of dollars in excess of the "damage" she suffered. And, of course, the citizens' rights to sue their state or local governments in the state courts, under state laws, will not at all be affected.

I do want to say a word about the serious problem facing us all under the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. § 1988.

That act, perhaps, costs us more money in attorneys' fees than § 1983 costs us in actual damages. Again, I suggest that the courts have extended the implication of that act far beyond what Congress intended in enacting it in 1976, and have been completely unable or unwilling to exercise any restraint that area, but I do want to express to the subcommittee our extremely serious concern regarding the impact of § 1988.

It is my understanding that the committee will be dealing with that problem when appropriate legislation is drafted and introduced. I want to make clear at this point our endorsement and support of any Congressional effort to provide some moderation in this area, to express my willingness and the willingness of the National Association of Attorneys General, to work closely with the Congress in developing and enacting such legislation. Again, in that regard, the report of the NAAG subcommittee to which I referred earlier deals at some length with the attorneys' fee problems and contains some specific legislative recommendations. I commend those recommendations to your attention, and look forward in the future to working with you with a view toward incorporating them, or similar provisions, into law.

Lastly, I should make clear my obvious opposition to S. 990. That will, unlike S. 584 and S. 585, vastly expand § 1983 liability, along with, of course, the attendant attorneys' fees awards, rather than contract that liability. Such an appproach is entirely unsound and unwarranted. The potential fiscal impact of that bill is enormous. I am unalterably opposed to its passage. It would cast in concrete what we strongly urge the Congress to discard; that is the tendency of the Court to turn § 1983 into a general, federal tort law for use against the states and municipalities.

In conclusion I again quote Justice Powell. In footnote 13 at the conclusion of his concurring opinion in Parratt v. Taylor, he says, ". . . In view of increasing damages-suit litigation under § 1983, and the inability of courts to identify principles that can be applied consistently, perhaps the time has come for a revision of this century-old statute--a revision that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action." I disagree with only one of the Justice's words. There is no "perhaps" about it. The time has indeed come for Congress to limit the scope of this law, as well as to moderate the impact of attorneys' fee awards under §§ 1983 and 1988.

Thank you, Mr. Chairman, for the opportunity to appear and express my views here today I would, of course, be more than happy to answer any questions which you or the members of the subcommittee might have.

SUGGESTED AMENDMENT TO S. 584

It should read as follows:

That § 1979 of the revised statute (42 U.S.C. § 1983) is amended by inserting between the words "Territory" and "subjects" the word "willful"; by striking out "and laws" and inserting in lieu thereof the following: "And by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States"; and by inserting after the words "shall be liable" the words "for actual damages only."

ADDITIONAL STATEMENT OF KENNETH O. EIKENBERRY IN SUPPORT OF S. 585

Mr. Chairman and Members of the Subcommittee,

Again, let me begin by thanking the Chairman for holding these reconvened hearings today and thus providing not only myself, but other attorneys general as well, the opportunity to address specific proposals for bringing some reason and moderation into the award of attorney's fees, an area which not only my state, but every other state in the nation, finds to be of increasingly significant concern.

Before proceeding further, let me reaffirm the testimony which I gave on this same subject on July 23. I will not repeat that testimony, but I do want to emphasize that our concerns in this area have not disappeared, but instead have increased, since that date.

With that introduction, let me proceed to address each of the specific provisions of the proposed amendments to S. 585.

The first proposed amendment, reestablishing good faith immunity for governmental entities, is in my judgment absolutely essential, and I enthusiastically support it. I would only suggest, in the sense of adding pepper to the salad, that it be tightened even further by rephrasing the amendment in the following manner:

On line 5 strike all after "entity" and replace it with the following: "Unless the Court finds that the officials thereof acted in bad faith and without a reasonable belief that the actions complained of did not deprive any person of any rights secured to them by the constitution of the United States."

Proceeding to the specific attorney's fees amendments, I support, and urge the adoption of, the first amendment on lines 11 through 18, so far as it goes. The amendment does not, however, go far enough.

First, it is our position that "special circumstances" should be defined, if not in the bill itself, then in the committee report accompanying the bill. I believe that, as an absolute minimum, special circumstances should include both of the following elements:

(1) The plaintiff's ability to pay. For example, the Supreme Court currently has pending for decision a case involving a question as to whether or not the Consolidated Freightways Corporation is entitled to an attorney's fee award in what we call a "dormant commerce clause" case. That issue should simply have never gotten to that stage in litigation or that level of the judicial system. The District Court should have been able to simply say "you don't need attorney's fees, Consolidated; go away." The very fact that the Consolidated Freightways Corporation, one of the nation's larger business entities, can make an argument that they are entitled to an award of reasonable attorney's fees against the State of Iowa, in the event that a dormant commerce clause case is a proper 1983 action, speaks volumes for the proposition that Congress simply must limit these awards to circumstances where the plaintiff has a demonstrated inability to pay the attorney's fees involved, and thus an award is necessary is order to promote the protection of constitutional rights.

(2) The nature and source of the funding of plaintiff's attorneys should likewise be a special circumstance, as a minimum. I would much prefer (and I will address this issue later) that publicly-funded attorneys and organizations be dealt with in the bill itself, at the very least the committee report should address this issue, in order to clarify Congress' intent. The fact that the attorneys prosecuting a successful 1983 action are already publicly-funded, and specifically that they are, in many cases at least, funded by the very defendant whom they are suing, should at the least be a special circumstance permitting, if not requiring, a

district court to deny an award of reasonable attorney's fees, at least to the extent that such an attorney or organization is funded by the entity involved. In other words, if a legal services organization derives 50 percent of its funding from a state or municipality, and prevails in an action against that state or municipality, then the court should determine what a reasonable attorney's fee amounts to, and the publicly-funded organization should be entitled only to 50 percent of that amount, or whatever other percentage represents the percentage of non-public, or private funds involved in financing the organization.

Secondly, still with respect to the first proposed amendment, I would urge that the word "frivolous" be deleted. The addition of that word may make the standard which a prevailing defendant must show simply too difficult, and thus the protection against groundless suits which the amendment seeks to provide illusory. I would think that the necessary inhibition against groundless and unfounded litigation, and the necessary protection of plaintiffs acting in good faith, could be provided by the retention of the words "unreasonable, or groundless." I am afraid that making standard one of frivolity will simply make it far too difficult for prevailing defendants, who have been subjected to groundless litigations, to secure an award of attorney's fees.

With respect to the amendment contained in subsection (2)(b) I again enthusiastically support its substance. I would suggest that it be turned around, however, to more accurately reflect what I think its intent is, and that it read, commencing line 23 of the first page, as follows: ". . . the Court may not award attorney's fees unless it finds that the preponderant reason for such joinder was not to recover attorney's fees."

I support fully the proposed amendment contained in subsection (2)(c).

With respect to § (2)(d) I again endorse it as far as it goes. I would urge that on line 11, of page 2, the word "preponderant" be replaced with the word "sole" so that the last two lines of that subsection would read as follows: "Unless the sole reason for such change was the pendency of the litigation."

Again, with respect to " (2)(e) I would suggest some improvement. One of the great problems which states and municipalities are facing in this area is the award of attorney's fees based on services which are duplicative, which were cumulative, or which were in some other way wasteful or were not necessarily performed in order to secure the result attained. I would thus urge, in the strongest terms possible, that line 15 of page two include the word "necessarily," so that that line would read as follows: "Services necessarily and reasonably performed." I of course absolutely, and without qualification, support the proposed abolition of the grossest abuse in this area and that is the use by courts of contingency factors or multipliers in awarding attorney's fees. There simply is no room whatsoever for such windfall profits to attorneys in this area, to be gained solely from scarce public funds, and federalism, fiscal responsibility, due concern for the problems of states and municipalities, and simple common sense require that. If the Congress is to do nothing other than prohibit under any circumstances the use of multipliers, bonus awards, or contingency factors, it will have significantly improved public policy in this area.

The only suggestion I would make with respect to § (2)(f) of the proposed amendments is that it be made clear that the thirty-day limitation is jurisdictional. In other words, no after thought attorney's fees awards should be permitted, and certainly, as we have seen in the case of White Mountain Apache v. Bracker, cited in the NAAG Report accompanying my earlier testimony, the Congress should make it impossible to carry a final judgment in one non-1983 action over to another court and be compensated with an award of attorney's fees as a separate cause of action brought under § 1988. I think the bill itself, or the accompanying committee report, should make it absolutely clear that an award of attorney's fees may be based only on the final judgment in that action, and only when the complete application is submitted within thirty days of the final judgment.

Let me again emphasize, Mr. Chairman, that while I unhesitatingly support the proposed amendments, at the same time I urgently suggest to the Subcommittee that they do not go far enough. I again refer you to my earlier testimony given in July, to the testimony of Attorney General David Wilkenson of the State of Utah, given on the same day, and to the report of the National Association of Attorneys General, which is a part of your record. I strongly believe, as do most of my brother attorneys general, that each of the elements of the problem which we then discussed should be addressed by this Subcommittee, should be contained in a bill reported out by this Subcommittee, and should be accepted by the Congress.

Briefly, let me touch upon some of the major areas in which I believe that the proposed amendments fall short.

First, as I suggested earlier, we continue to see a serious problem with so-called double-dipping, the interference with fundamental concepts of federalism associated with federal court attorney's fee awards imposed upon states and municipalities in favor of attorneys and organizations which those same states and municipalities themselves fund. I again strongly urge the Subcommittee to include within its bill a provision denying attorney's fees to the extent that any organization is publicly-funded. Again, at the risk of repeating myself, we are not urging that legal services organizations, for example, be absolutely ineligible under all circumstances for attorney's fees awards. What we are saying is simply this: If a legal aid society or legal services organization operates entirely without public funds, than that organization should be treated just like a firm of private attorneys and should be eligible for an award of reasonable attorney's fees. If, on the other hand, that organization is either wholly, or partly, publicly-funded, then that source of their funds should, as an absolute minimum, be taken into consideration in determining an appropriate attorney's fee award. If an organization is 100 percent publicly-funded, they should be ineligible for any award of attorney's fees, at least from the public entity which funds them. If such an organization is only partially financed with public funds, then they should be eligible for an attorney's fee award only in the same percentage as they are financed with private funds. If thirty, or fifty percent of their financing is from public sources, then the reasonable attorney's fee determined in connection with that litigation should simply be reduced by a commensurate thirty or fifty percent to reflect that public funding.

Likewise, the bill itself, preferably, but at the very least the committee report, should deal with the burgeoning problem of duplication of effort, wasteful effort, compensation for attorney's services unnecessarily rendered, or rendered in such a fashion that they did not assist in any way in securing the result obtained on behalf of the prevailing plaintiff. Likewise, in my strong view, voluntary intervenors should be absolutely ineligible for an award of attorney's fees unless it is clearly demonstrated, and the Court finds, that their intervention was necessary, and that the intervenors attorneys rendered reasonable and necessary services which were essential to produce the result obtained. I do not believe that this Subcommittee should further countenance, Mr. Chairman, the wasteful expenditure of increasingly scarce public funds to compensate batteries of lawyers who sit around monitoring multi-party litigation, particularly under circumstances where many of those attorneys represent voluntary intervenors in the action, whose presence was not necessary in the first place, and who produce nothing toward securing the result obtained.

Departing from the area of attorney's fees, I would urge, in the strongest terms possible, that the Subcommittee not lose sight of the overall substantive problem, and that is the expanding liability which the states and municipalities are facing under § 1983 itself after Maine v. Thiboutot. Without repeating the earlier concerns which I expressed, I simply want to remind the Subcommittee of those major concerns.

You should report out, and the Congress should pass, S. 584 so that § 1983 is, in the future, used for its original intended purpose; that is the protection of legitimate, constitutionally-based, civil rights of this nation's citizens. Additionally, I earnestly hope that you will give serious consideration to the amendment I suggested to S. 584, in my July testimony, which would limit 1983 liability to "willful" actions which would limit awards to actual damages only, rather than punitive damages, even against individuals as contrasted from cities or states themselves. City of Newport v. Fact Concerts has solved only part of that problem. Do not lose sight of the fact that when individual public officers are held liable for punitive damages, that money must and does come, in almost every case, as a matter of governmental necessity, from a public treasury.

The Subcommittee should deal with the question of a 1983 litigant's need to exhaust adequate and appropriate state administrative remedies before bringing an action. In that respect, the Subcommittee should be aware of the fact that tomorrow that very issue will be argued in the Supreme Court in a case entitled Patsy v. Board of Regents of the State of Florida. Regardless of the outcome of that case, however, I recommend that you reaffirm and reiterate what I believe, and most of my colleagues believe, to be the original intent of Congress; that is where state law provides an adeqwuate and appropriate administrative remedy for the redress of any constitutional grievance, a prospective 1983 plaintiff must first avail himself or herself of such remedies before bringing an action, in either a state or federal court. I think that should always have been the case, I think that is always what Congress has intended, and I am simply recommending that you restate that intent at this time.

Finally, Mr. Chairman, I want to again restore my absolute and unalterable opposition to the passage of S. 990. The approach embodied in that bill does not, in my view, reflect sound public policy for this country today.

Again, thank you very much for the opportunity to make these remarks here today.

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL
2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE [illegible]
CONSUMER PROTECTION [illegible]
ANTITRUST [illegible]

February 25, 1982

Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D. C.

Gentlemen:

Re: Comments on S. 585 and
Propose Amendments

As Attorney General of the State of Kansas, I have reviewed S. 585 and Senator Hatch's Proposed Amendments with interest. Amendments to 42 U.S.C. §§1983 and 1988 are long overdue. The State of Kansas, its officials, and subdivisions have been deluged by the proliferation of frequently frivolous litigation involving sections 1983 and 1988. Therefore, I am pleased to offer the following comments concerning the legislation you have under consideration.

I strongly support Senate Hatch's proposed sections (c), (d), and (e) of Sec. 722A. These limitations on awards of attorney fees and other costs are fair to all parties and necessary for state governments. However, I cannot lend equal support to sections (a) and (b) of proposed Sec. 722A.

Section 722A(a) is merely a congressional codification of the current federal courts' interpretation of the term "prevailing party" in 42 U.S.C. §1988. This interpretation runs counter to the original congressional intent that plaintiffs and defendants should be equally treated concerning their ability to seek attorney fees should they receive a favorable judgment. It is exceedingly rare for a prevailing defendant to be able to convince a court that a claim was so frivolous, unreasonable, or groundless that there is an entitlement to an attorney fee award. I believe that in order to provide equal protection under the law to plaintiffs and defendants alike, the states, their officials and political subdivisions should be allowed to recover their attorney fees and costs on the same basis as prevailing plaintiffs. All parties in litigation should be treated equally by the law.

Section 722A(b) is an attempt to limit the application of a section 1988 attorney fee award in pendant jurisdiction claims. However, the limitation would allow such an award of fees so long as the major purpose for the joinder was not for the purpose of recovering attorney fees pursuant to section 1988. This appears to give support to the legally insupportable proposition that parties can recover attorney fees, pursuant to section 1988, on pendant jurisdiction claims. No attorney fees should be allowed for pendant jurisdiction claims, since there is no federal interest dictating such a position. There is no need for a private attorney general concept in this area of torts.

I am in partial support of Senator Hatch's proposed amendment to section 1983. I support it because it provides needed immunity for local government entities following the United States Supreme Court's decision in Owen v. City of Independence, 445 U.S. 622 (1980), which abolished Eleventh Amendment immunity for local government units. However, I suggest that state officials also be given needed protection in the proposed amendment to section 1983. I am growing increasingly concerned about government officials who must make discretionary decisions on a daily basis on behalf of the governmental entity and the citizens of the states. These officials are now being subject to suit and personal liability every time they make necessary hiring, promotion, and termination decisions within the scope of their employment as state officials. This is costing state government a tremendous loss in time and money. They currently have a qualified good faith immunity defense available to them, but federal courts have held their good faith is a factual matter that must await a jury decision after trial. Thus, state officials cannot even hope to avoid the time, trauma, and cost of trial by being granted summary judgment. The qualified immunity affords them little protection. I would also suggest that the term "good faith" is vague. Thus far, the United States Supreme Court has not established a clear standard upon which to judge good faith. I would suggest that the term "good faith" in the proposed amendment to section 1983 be changed to provide that damages will not be awarded if the court finds that the officials thereof acted "reasonably under the circumstances known to them at the time of the action complained of."

Thank you for the opportunity to address your committee on these issues. If I may be of any further assistance, please let me know.

Very truly yours,

Robert T. Stephan

Robert T. Stephan
Attorney General of Kansas

MC

PREPARED STATEMENT OF LEROY S. ZIMMERMAN

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR GIVING ME THIS OPPORTUNITY TO JOIN OTHER MEMBERS OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL IN SUPPORT OF SENATE BILLS 584 AND 585.

ATTORNEYS GENERAL WHO HAVE PRECEDED ME IN TESTIMONY BEFORE THIS SUBCOMMITTEE HAVE DISCUSSED THE HISTORICAL DEVELOPMENT OF LAWSUITS UNDER SECTION 1983. THEY HAVE ALSO DESCRIBED THE GENERAL APPLICATION OF SECTION 1988 IN THOSE LAWSUITS. I WILL NOT DUPLICATE THEIR COMMENTS BUT, INSTEAD, WILL FOCUS ON SPECIFIC PROBLEMS EXPERIENCED BY THE COMMONWEALTH OF PENNSYLVANIA WHICH I BELIEVE WILL HIGHLIGHT THE NECESSITY FOR SUCH REMEDIAL LEGISLATION.

IN THIS REGARD, LET ME FIRST SAY THAT I FULLY SUPPORT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL IN URGING THE PASSAGE OF SENATE BILLS 584 AND 585, AS WELL AS SENATOR HATCH'S PROPOSED AMENDMENTS TO SENATE BILL 585. DIRECTING MY COMMENTS TO THOSE AMENDMENTS, IT IS MY BELIEF THAT THE ATTORNEYS' FEES ACT WAS NOT INTENDED TO ENCOURAGE FEDERAL COURT LITIGATION OF STATE LAW CLAIMS. ACCORDINGLY, AS PROVIDED IN SUBSECTION 722A(B) OF THE PROPOSED AMENDMENTS TO SENATE BILL 585, LITIGANTS SHOULD BE PROHIBITED FROM ASSERTING STATE LAW CLAIMS AS FEDERAL CIVIL RIGHTS ACTIONS FOR THE PRIMARY PURPOSE OF COLLECTING ATTORNEYS' FEES UNDER SECTION 1988. SIMILARLY, COUNSEL FOR A PLAINTIFF WHO REJECTS A SETTLEMENT OFFER WHICH IS AS FAVORABLE AS A LATER JUDGMENT SHOULD NOT COLLECT ATTORNEYS' FEES ON THE PREVAILING PARTY THEORY FOR ANY LITIGATION UNDERTAKEN BECAUSE OF THE REJECTION OF THE SETTLEMENT. THIS PHILOSOPHY IS REFLECTED IN SUBSECTION 722A(C) OF THE PROPOSED AMENDMENTS.

I BELIEVE, HOWEVER, THAT THE PROPOSED LEGISLATION COULD go farther in protecting the fiscal integrity of the states' budgetary responsibilities.

Essentially, we can perceive four problem areas. The first, and perhaps the most serious from a legal standpoint, is the case where substantial attorneys' fees are awarded notwithstanding the fact that a plaintiff has been denied damages because the defendants were found to have acted in the good faith belief that their actions were proper.

In Skehan v. Board of Trustees of Bloomsburg State College, a ten-year-old civil rights case with too many published opinions to list here, a non-tenured college professor alleged that he had been terminated without due process and for reasons violative of his First Amendment rights. Eventually, the Federal Court rejected his First Amendment claims but found he had been terminated without hearings required by his employment contract. The Court ordered he be reinstated in a "suspended with pay" status pending a hearing on his termination. Pursuant to the Court's order, a hearing was held before the professor's peers, and his termination was found to have been justified. He was terminated again.

During the pendency of the hearing, while on "suspended with pay" status, the plaintiff received less than $25,000. The Court refused to award back pay dating to his original termination on the grounds that the individual defendants had acted in good faith. His attorneys requested over $150,000 and received $50,000 from the Commonwealth of Pennsylvania as a result of various court orders and settlements throughout the litigation.

The Skehan case illustrates at least two problems. First, the Commonwealth essentially won this case. The plaintiff collected only an insignificant fraction of the amount of money he sought. Yet, Pennsylvania was required to pay twice the amount--$50,000--to the plaintiff's attorneys.

WHILE COURTS HAVE RECOGNIZED THAT IMPORTANT PUBLIC INTERESTS ARE SERVED BY PROTECTING PUBLIC OFFICIALS FROM LIABILITY FOR DAMAGES WHEN THEY ACT IN GOOD FAITH, THERE IS NO SIMILAR PROTECTION FROM THE ASSESSMENT OF ATTORNEYS' FEES. IN THIS REGARD, THE SUPREME COURT HAS IDENTIFIED SEVERAL IMPORTANT POLICY CONSIDERATIONS SUPPORTING THIS IMMUNITY FROM MONEY DAMAGES, INCLUDING THE DANGER THAT THE THREAT OF SUCH LIABILITY WOULD DETER PUBLIC OFFICIALS FROM EXECUTING THEIR DUTIES WITH THE DECISIVENESS AND JUDGMENT REQUIRED BY THE PUBLIC GOOD. SCHEUER V. RHODES, 416 U.S. 232, 240 (1973). THIS SAME CONSIDERATION REQUIRES THAT A PUBLIC OFFICIAL AND THE STATES HAVE LIMITED LIABILITY FOR ATTORNEYS' FEES.

TO THE EXTENT THAT THOSE FEES MIGHT HAVE TO BE PAID BY THE OFFICIAL, THE DETERRENT EFFECT IS OBVIOUS. THE IMPOSITION OF ATTORNEYS' FEES ON THE STATE RATHER THAN THE INDIVIDUAL IS EQUALLY HARMFUL. ANY RESPONSIBLE, CONSCIENTIOUS PUBLIC OFFICIAL WILL BE SUBSTANTIALLY AFFECTED BY THE THREAT THAT HIS OR HER DECISIONS, IF ERRONEOUS, MIGHT RESULT IN THE IMPOSITION OF SUBSTANTIAL FINANCIAL LIABILITY ON HIS OR HER PUBLIC AGENCY. THAT THREAT, LIKE THE THREAT OF PERSONAL LIABILITY, SERVES TO DETER DECISION-MAKING AND FORCEFUL ACTION BY SUCH PUBLIC OFFICIALS.

ANOTHER SERIOUS FISCAL PROBLEM FACED BY STATES IS CREATED BY THOSE CASES IN WHICH A PLAINTIFF BRINGS A LAWSUIT SEEKING TO COMPEL CERTAIN DEFENDANTS TO TAKE SPECIFIED ACTIONS. EVEN THOUGH DEFENDANTS HAVE TAKEN VOLUNTARY ACTION, THE COURTS HAVE BEEN AWARDING ATTORNEYS' FEES TO PLAINTIFFS ON THE THEORY THAT THE LAWSUIT WAS THE "CATALYST" FOR THE DEFENDANTS' INITIATIVES. SEE, ROSS V. HORN, 598 F.2D 1312 (3RD CIR. 1979).

THIS THEORY IS NOT ALWAYS SOUND. FREQUENTLY, DEFENDANTS TAKE SUCH INITIATIVES, NOT BECAUSE THEY BELIEVE THEY ARE LEGALLY REQUIRED AND MAY BE ORDERED BY THE COURT, BUT BECAUSE THEY RECOGNIZE THE DESIRABILITY OF CHANGE FOR SOCIAL OR ECONOMIC REASONS.

The fallacy of the theory is that it destroys any incentive to make change because the pendency of a civil rights action could substantially increase the original costs of doing that which the lawsuit seeks to compel.

This problem of costs is exacerbated by legal and ethical restraints on the negotiation of attorneys' fees awards in conjunction with the merits of the case. For example, at least one state has apparently barred defendants on ethical grounds from negotiating attorneys' fees with the merits of the case. Committee on Professional and Judicial Ethics of New York City Bar Association, Opinion No. 80-94, 9/20/81. Several courts have found such settlements to be barred by the Attorneys' Fees Act itself. See, Prandini v. National Tea Company, 557 F.2d 1015 (3rd Cir. 1977); Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978). Thus, defendants must consider settlement of litigation without knowing the final cost. Indeed, a case which a state has essentially won, without judgment, through litigation, may settle at a cost favorable to the state but require an attorneys' fee award far out of proportion to the relief.

One request for attorneys' fees is pending in Institutionalized Juveniles v. Secretary of Public Welfare, a case in which the plaintiffs sought to enjoin Pennsylvania to institute extensive hearing procedures prior to the admission of juveniles to institutions for the mentally ill and mentally retarded. Twice the United States Supreme Court rejected lower court orders requiring the state to hold the hearings requested by the plaintiffs. Kremens v. Bartley, 431 U.S. 119 (1977); Institutionalized Juveniles v. Secretary of Public Welfare, 442 U.S. 640 (1979). Indeed, the United States Supreme Court specifically approved Pennsylvania's procedures.

Nonetheless, on remand, the plaintiffs' counsel is seeking extensive fees. Several years after the lawsuit was commenced, the Pennsylvania Legislature, a non-party to the action, modified some of the procedures at issue in the lawsuit. Plaintiffs' counsel now claims the legislative modifications granted part of the relief requested by the plaintiffs.

Ironically, plaintiffs' counsel challenged the legislative modifications as being totally inadequate. An award of attorneys' fees to plaintiffs' counsel under the facts of this case clearly establishes the need for remedial legislation.

Senator Hatch's proposed amendments, insofar as they provide that voluntary action by defendants can be a basis for attorneys' fees only when the preponderant reason for such action is the pendency of litigation, would partially meet that factual situation.

Other concerns remain. When District Court orders, subsequently held to be invalid, remain in effect during the pendency of an appeal, the litigation will have benefitted the the plaintiffs. Such litigation would, therefore, arguably provide a basis for an award of attorneys' fees, even though the defendants had ultimately prevailed. Just such a situation is presented by the case of Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3rd Cir. 1979). The District Court found that the United States Constitution and various federal and state laws required the Commonwealth of Pennsylvania to close Pennhurst Center for the Mentally Retarded, a state institution, and relocate the residents to community facilities. The United States Court of Appeals for the Third Circuit essentially affirmed the District Court's order but did so on very limited grounds, substantially different than those relied on by the District Court. The United States Supreme Court disagreed with the Court of Appeals but did not reach most of the issues decided by the District Court. Instead, the United States Supreme Court remanded to the Court of Appeals for a

DECISION ON THOSE ISSUES. Halderman v. Pennhurst State School and Hospital, 451 U.S. 1 (1981).

The District Court orders, dating from early 1978, required that the defendants improve conditions at Pennhurst and, at the same time, move residents into the community. While neither the Court of Appeals nor the United States Supreme Court has adopted or approved any part of the District Court's analysis, that Court's orders have remained in effect for over four years. Meanwhile, conditions at Pennhurst have indisputably improved, and many residents have been moved into the community. The plaintiffs have received some of the relief they requested.

Ultimately, Pennsylvania may very well be correct in its claim that the improvements at Pennhurst were not required by law. Since conditions at Pennhurst now comply with the District Court orders, the propriety of these orders is now essentially a moot issue.

Pennsylvania will probably prevail in its claim that the movement of residents from Pennhurst into the community is not legally required. Yet, hundreds of residents will have been moved by then. The question then is whether Pennsylvania should be responsible to the plaintiffs for attorneys' fees related to obtaining a District Court judgment which was later ruled invalid, but which benefitted the plaintiffs prior to its reversal. Senator Hatch's proposed amendment would clearly require the answer to be "no".

A major fiscal problem to the states is created by the award of counsel fees to publicly funded legal services organizations. For example, in the 1979-80 fiscal year, the Pennsylvania Legislature appropriated slightly over $2,000,000 to legal services associations. In that same year, legal services associations were awarded over $275,000 in attorneys' fees in litigation brought against the Commonwealth and its officials. See, Bolden v. Pennsylvania State Police, 491 F.Supp. 958 (E.D. Pa. 1980) (over $150,000); Vecchione v. Wohlgemuth, 481 F.Supp. 776 (E.D. Pa. 1979) (over $110,000). Such awards serve no public purpose and wreak havoc upon the state's budget planning process.

In pursuing civil rights actions against state officials, the legal services organizations are doing exactly what the state and federal governments are already paying them to do. Indeed, all but one of the cases in which legal services organizations recovered fees from the Commonwealth of Pennsylvania in the 1979-80 fiscal year were commenced prior to the enactment of the Attorneys' Fees Act in 1976. There can be no argument that the awards of over $275,000 in those cases encouraged qualified counsel to bring lawsuits which would not otherwise have been brought--the stated purpose of the Attorneys' Fees Act.

The Pennsylvania Legislature, as well as other state lawmaking bodies, cannot anticipate such awards, and funds for their payment must be diverted from necessary governmental functions. The inability to anticipate for budgetary purposes always is onerous to state legislatures but is manifestly unfair when the awards are made to legal services organizations already funded by public monies. This double-dipping must be stopped by the Congress.

In closing, I again note my full support for Senate Bills 584 and 585 and Senator Hatch's proposed amendments. I also urge the Subcommittee to reconsider in depth the entire matter of attorneys' fees and specifically to consider the problems I have described.

Thank you.

Senator DECONCINI. General Clark?

Mr. CLARK. Senator, like my colleagues, I am pleased to be here, and I do have some prepared testimony I would like to submit for the record.

Senator DECONCINI. Without objection.

Mr. CLARK. I suppose my role really is to say "amen" to that which has gone before and perhaps attempt to summarize a little bit. It is clear that the attorneys general and myself support the vindication of civil rights; any abuses that occur in this country, there must be redress for those. It is also a fact that we recognize there are abuses in terms of the Attorney's Fee Act and the fee-shifting statutes as they apply in our jobs, as we see them, and in our respective States. We all can tell horror stories, and I really don't think the time of this committee is well-served in hearing those necessarily.

Senator DECONCINI. Mr Clark, you have got a heck of a story that is in your statement.

Mr. CLARK. Yes, sir, we do have quite a horror story.

Senator DECONCINI. A $1.7 million fee, and I am glad that that is in the record—but please proceed.

Mr. CLARK. We also are very much aware that there is no standard, and the only standard is that of that trial judge, and we debated this morning whether there are 600 district judges or 400 district judges, but reasonable standards in the mind of each of those judges, and so therefore within each judicial district—for instance, in my experience in Arkansas in one district alone, we have three different standards, depending on these kinds of issues. We also I think are in accordance that there is a great deal of confusion. The Supreme Court has provided no guidance to the States, to the lawyers, to the bar, on this issue either I think in the *Blum* decision or in the Hinsley *decision*.

And because there is no standard and there is no cap and there is no reasonable test, particularly under 42 U.S.C. 1988, you can see cases tried in which the attorneys recognize that they have won a forum and an opportunity of great return in terms of income, and so I guess this is the academic side coming out in me, that you see lawsuits more tried as legal seminars or humanities seminars than in fact litigation to vindicate civil rights.

You also I think from time to time—and this is part of our experience in Arkansas—see that perhaps the intent of the particular section 1988 may be abused to the degree that it is used for the purpose of punishment, which I don't think was the intent whatsoever when Congress enacted this in 1976.

One other point that I would try to make is that I do think that the present legislation without a standard erodes the concept of pro bono completely. Our experience in Arkansas was one in which a law firm which is not renowned for its efforts in civil rights litigation, but perhaps more renowned for its efforts in dealing with securities matters and corporate mergers and others, got involved on a pro bono basis, publicly stating such, only later to come back and requests hundreds of thousands of dollars in legal fees, and so their pro bono effort was one in which they asked to be paid also.

I summed it up in my comments, and I think this at least translated well in Arkansas and I hope it does to this committee in terms of making a record: without some sort of standard, without an effort to give some specific guidance, a reasonable standard, what we have here is an act that provides every plaintiff's lawyer to desire to ride to the courthouse in a Cadillac when sometimes a Chevrolet would do:

[The following was received for the record:]

PREPARED STATEMENT OF STEVE CLARK

Mr. Chairman and Members of the Subcommittees: It is with pleasure I address this body on the issue of attorneys' fees awarded under 42 U.S.C. 1988. My concern is that of a state legal officer with a duty to defend a state action, legislator or executive. When my office enters into civil rights litigation, one of our reoccuring concerns is attorneys' fees. We know when a complaint contains a Section 1983 allegation, a Section 1981, Title VII allegation, or any other civil rights cause of action, that: (1) chances of settlement will be slim because of the often desire of plaintiff attorneys to try the lawsuit, extend litigation to its fullest, and build a fee. Secondly, we know that further litigation of any fee award to a prevailing plaintiff is likely because of the wild variation in construction of the current fee shifting statutes. Moreover, we recognize that, should the State defendants prevail, there is virtually no chance that the State will receive attorneys' fees as a "prevailing party". This is so despite the fact that the current statutes provide that "prevailing parties" should receive fees, with no differentiation between plaintiffs and defendants. The state as a defendant is not awarded attorneys' fees regardless of proof of the frivolous nature of the plaintiff's case.

These concerns all add up to a fee procedure that is wasting the time of the federal judiciary to an alarming degree and raiding state treasuries of hundreds of thousands of dollars. The primary cause of this judicial inefficiency is that the state of the law on attorneys' fees is chaotically applied and unfairly balanced on the side of plaintiffs' attorneys. The bill you are considering today is, I believe, a necessary step in clearing the confusion regarding fees, and tilting the scales a little more in the direction of balance and fairness.

A case recently tried by my office is, I believe, illustrative of the way some civil rights cases have become boondoggles for plaintiff lawyers and impose unfair burdens upon the states.

In March of 1981 a rather controversial law was enacted by our State Legislature and signed by our Governor. That law would have required that the theory of creation-science be taught in our public school classrooms if the theory of evolution was also taught. The law was to go into effect the school year of 1983, September. A lawsuit challenging the constitutionality of this act, Act 590, seemed inevitable. Indeed, soon after being signed into law, a group of ministers, religious organizations, students, teachers and parents sued the State Board of Education to prevent the Board from implementing the act. It became the duty of my office to defend Act 590 and I assigned three lawyers from my staff to prepare the defense. The lawsuit was filed in May of 1982 and the trial occurred in December of 1982. To illustrate my first conclusion that these type cases have litigation extended to the fullest, please note what followed.

The plaintiffs initially employed local counsel, two local lawyers who are highly respected throughout the legal community in Arkansas. One of the local attorneys, in fact, had built a regional, perhaps even national, reputation as a fierce defender of civil rights and liberties in our state since the 1960's. We in Arkansas proudly consider him to be one of the leading civil rights attorneys in the country.

The case became a cause celebre for one of the plaintiffs' primary sponsors, the American Civil Liberties Union (ACLU). Under agreement with the ACLU, a New York Law Firm, noted as a leading securities and corporate law firm, but with little or no demonstrated experience on civil rights law, entered the case as co-counsel. Soon the New York firm's lawyers became lead counsel, and more than 20 of its lawyers, ACLU lawyers and local counsels, and scores more para-legal and support staff immersed themselves in research about the legal and scientific issues involved in the case. The plaintiffs' litigation staff was divided into teams with team leaders who were responsible for different scientific disciplines with the object of disproving the theory of creation and proving the theory of evolution for the Court. To coordinate the effort, countless meetings, telephone conferences, "working lunches", etc. were held. Two lawyers, one in New York and one in Arkansas, were responsible for nothing but coordination of the plaintiffs' legal efforts. The plaintiffs spared no expense calling upon the preeminent scientists and theologians of the world to support their cause. Depositions were taken all over the country requiring extensive travel. The minimum time for a deposition had been set at six (6) hours by order of the Court after the plaintiffs made such a request. More than $50,000 was expended by the plaintiff to copy everything they might possibly need to try the lawsuit.

After several months of this, the trial was finally held. The Court eventually declared Act 590 unconstitutional. The Court in its opinion ordered that the Act could not be implemented and thus avoided any legal injury to any Arkansas citizen who might have been affected by the Act.

Then came the bill. Plaintiffs requested New York rates for all the lawyers in the case. For just over 6 months' work, for the time all the lawyers spent to learn the constitutional and factual issues involved and finally for putting on the plaintiffs' case, plaintiffs asked for a staggering $1.4 million. To illustrate my second point, where the state objects to the fees requested, more litigation ensured for which plaintiffs claimed another $300,000 in fees, bringing that total to $1.7 million, a king's ransom. When my office began to research the attorneys' fees issues, it became apparent that the law was "all over the map." In fact, considerable discretion is given to the federal district courts to decide fee awards in civil rights cases and the term "reasonable fees" as it appeared in the act had been very broadly construed.

The presiding judge in this case was relatively new to the bench. He was a practicing trial lawyer in Little Rock for many years prior to assuming the bench. Having recently left the practice, he knew the billing rates of the best Little Rock lawyers, and applied that rate, rather than the New York rate, to the fee request of the plaintiffs. He did eventually allow most of the hours they requested, but he noted that he was very familiar with the Little Rock Bar and that he knew plaintiffs' could have found local counsel to represent them at much less cost than was actually expended. It is also interesting to note that, during the hearing on fees, the judge called the plaintiffs' attorneys to task for not moving for a summary judgement before trial. That move alone could possibly have concluded the matter short of having to incur the expense of extensive discovery and the trial itself. It is obvious that the judge believed the case could have been more economically tried by the plaintiffs' attorneys. But it is clear from the cases and my own experiences that other judges, even within the same jurisdiction, could have and would have awarded the plaintiffs' attorneys all they ask for and more. I think the bill before you addresses the problems raised in this case and recognizes that, when states are defendants in civil rights lawsuits, and when a Chevrolet is an adequate vehicle to take the plaintiff where he wants to go, then the state should not be forced to buy the plaintiff a Cadillac in which to ride. Nowadays, even that Chevrolet can be more than many states can afford.

I further submit to you that in this case the Court was being asked to impose an unreasonable attorneys' fees award to punish the state for having poor judgment in enacting such a statute. Clearly, it cannot be asserted that the intent of Congress in enacting fee-shifting statutes in civil rights cases was to give the Court a means to punish.

I do not mean to take issue today with the underlying purpose of the various fee-shifting statutes. Indeed, these statutes advance goals which I support—that everyone should be given legal protection against constitutional abuses. But confusion regarding construction of the law has bred into them a bias and unfairness toward state defendants. Surely Congress did not intend to punish or embarrass and belittle the efforts of the state attorneys defending state actions. It appears from present judicial application, plaintiffs' lawyers have carte blanche in requesting and receiving legal fees, regardless of how unreasonable or exhorbitant. This bill would greatly decrease the burden placed upon our states' treasuries due to unreasonable awards of attorneys' fees and perhaps begin to bring back a measure of balance and fairness in applying the fee shifting statutes to all parties in civil rights litigation.

Thank you.

Senator DECONCINI. Gentlemen, thank you. I understand what you are talking about, and Attorney General Corbin has shared with me his feelings, and my own reaction is a question to you. What if the law were drawn in such a manner that there was a cap—and I won't set the figure, 75 or 100 or whatever—but just a cap which the judge could not exceed, but which could be reduced if, for example, you had a liquor license case that obviously was not a civil rights violation. The judge could say, "well, we are not going to pay attorney's fees here," or, "we are not going to pay the cap amount that is petitioned," thereby not excluding people and getting away from the punitive measure that concerns me—one that I believe was never intended and shouldn't be. Even if the government is outrageous, there should be other remedies than the punitive measure.

If we did not go into as many standards that are set in this bill, how would that strike you—any or all of you?

Mr. BELLOTTI. Senator, that would go a great distance toward solving the problem. However, it would not, I think, set the standards that are necessary, and it also would not do one of the things that is very important to us. Application of the act has gone beyond civil rights cases; almost anything that is covered under the United States Code is a violation that is compensable under this statute—and that is wrong, that was not the intent. And it is the *Thiboutot* case that did that.

Senator DECONCINI. Well, perphaps you could apply it to all—not just civil rights cases, but all fee bills, all fee cases. You see, one of the things that bothers me as an attorney is putting a curb on the attorney as to what is excessive. Well, if it's outrageous, as you said, General Clark, every judge has got his own interpretation of what is excessive; it will be pretty out of line for a judge to say, "Well, you shouldn't have taken those extra depositions," or "you shouldn't have moved because that was an improper motion."

Who is going to make that judgment?

Mr. BELLOTTI. The judges, I think, Senator, have been very liberal in this regard, favoring the plaintiff's attorneys. And I think you can tell—I have probably tried 2,000 cases in my lifetime, and I can tell when I am doing things that are excessive, and they really have to be almost outrageous to be categorized that way.

The other side of the coin is that now the States are inhibited from proceeding. I look at a close case in my State and figure that I am going either to settle a case that perhaps should not be settled or I am going to end up first in the circuit court of appeals, and then in the Supreme Court of the United States, and as I am going along I am building up liability for attorney's fees. So it has a chilling effect on us on the other side with nothing on the plaintiff's side.

Senator DECONCINI. Your association—you mentioned just a sidelight, the Legal Services—your association has been on record supporting continued funding for Legal Services, isn't that correct?

Mr. BELLOTTI. I have always been a very strong advocate of that, Senator.

Mr. CLARK. That is correct, Senator.

Senator DECONCINI. That is the official position?

Mr. BELLOTTI. That is our majority position, but, I don't know if it is properly characterized as "official." It is not universally accepted, as is the attorneys-fees position we are articulating today.

Mr. WILKINSON. A resolution was proposed by General Bellotti, and General Miller of Iowa and General Easton of Vermont, plus some others, and, frankly, they got a majority of the attorneys general to vote for the resolution to sustain the LSC at its present level of funding—this was 3 years ago.

But due to some procedural maneuvering, a bunch of renegades like myself prevented them from passing the resolution, but no doubt a majority, maybe even three-fourths, of the AG's.

Senator DECONCINI. You oppose it personally.

Mr. WILKINSON. Well, I opposed the resolution back then 3 years ago. I am not sure that, in light of what has happened, that I would—and the resolution was cast in terms of 3 years old, namely, continue the funding then as it had been in 1980—I am not sure I would oppose it today.

Senator DECONCINI. Don't State and Federal Government entities routinely request the market rate in their own fee applications?

Do you ever make fee applications on behalf of your Government?

Mr. BELLOTTI. If we are talking—anyone can answer—but I have eliminated most of the outside special counsel.

Senator DECONCINI. When you do do it, or when you did do it, didn't you go in for the market rate?

Mr. BELLOTTI. The only way that you would do that, Senator, is in, for example, an Outer Continental Shelf type case where you had someone who was really an expert, who could command the market rate; other than that, I know I always pay much less than the market rate and have no problem getting lawyers.

Senator DECONCINI. You don't.

Mr. CLARK. Senator, in one prison case in which I have been involved, we requested fees and we did try to ascertain what the market rate was for lawyers in the Arkansas area, and they made that request to the court—at that time it happened to be at $75—and we were awarded about $400.

Senator DECONCINI. Is it true that in 1981 43 States signed an amicus curiae brief arguing that market-rate fees and multipliers were appropriate for attorneys employed by the State?

Mr. BELLOTTI. Not in my State—we weren't 1 of the 43. What year was this, 1981?

Senator DECONCINI. 1981.

Mr. BELLOTTI. I have no memory of that.

Senator DECONCINI. I am advised that some 43 States signed an amicus brief supporting market rates and multipliers in *Illinois* v. *Sangamo* (Sangamo Construction Company Case).

Mr. WILKINSON. I certainly would support a market rate; I would be dead set against a multiplier. I doubt if Utah is one of those 43 States.

I hope this is responsive, Senator: I certainly, having practiced in California for 6 years before going to Utah—I would be supportive of some way of adjusting for the fact that attorney's fees in California are perhaps 25 or even 50 percent higher than those in Utah or even Arizona. And I would certainly not be opposed to some way to adjust, some mechanism to adjust for those differences around the country.

Mr. BELLOTTI. Senator, that was an antitrust case I think you are referring to.

Senator DECONCINI. I believe it was.

Mr. BELLOTTI. Quite a different situation. Plus one other point I wanted to make was that Massachusetts——

Senator DECONCINI. Well, I'm not sure that I agree with you, general, that it's different. Whether or not you are going in for a right-of-way condemnation case or a civil rights violation or something else, the fact is if market rates had been supported, we ought to at least have that on the record as being one of the standards; we ought not to ignore it.

Mr. BELLOTTI. Well, I will check; I have no memory of that being my situation.

[The following information was subsequently submitted for the record:]

Upon subsequent investigation, Attorney General Bellotti confirmed that in 1980 he filed an *amicus curiae* brief on behalf of forty-one states urging the United States Court of Appeals for the Seventh Circuit to affirm a district court decision awarding attorneys' fees at market rates to the State of Illinois in an antitrust case, *State of Illinois* v. *Sangamo Construction Co.* He submitted the following supplementary comments for the record:

"The attorneys fees issue presented in *Illinois* v. *Sangamo Construction Co.,* 657 F.2d 855 (7th Cir. 1981), was not whether market rates were authorized as the proper measure of attorneys' fees awards under the Clayton Act; the cases under that Act had already firmly established the use of such rates. Rather, the question was whether states, suing in their *parens patriae* or proprietary capacities for relief under the Clayton or Sherman Acts, should be treated differently from private antitrust plaintiffs. On behalf of forty-one states, I argued that there should be no different fee analysis simply because the plaintiff happened to be a state suing to rectify damages to its citizens or itself as a result of proven antitrust violations by the defendant. Our brief did not argue for multipliers or bonuses.

"Our position with respect to the federal fee-shifting statutes covered by S. 2802 is not inconsistent with our *Sangamo* brief. One critical difference between antitrust cases generally and cases under 42 U.S.C. § 1988 is that attorneys' fees awards in antitrust cases are paid by the wrongdoers—the *Sangamo* defendants had been convicted of federal criminal antitrust violations arising from highway construction bidrigging—while in § 1988 cases the awards are typically paid with tax dollars that must be diverted from other pressing public problems.

"Second, the "market" rates we argued for in *Sangamo* were $50, $55, and $65 per hour for three assistant attorneys general whose work was described by the district court as "very high-caliber." *Id.* at 863. These rates are well within the $75 per hour cap contained in S. 2802.

"Finally, I note that the only applications my office has made for attorneys' fees under § 1988—an extremely rare occurrence—have been based on costs, not market rates, and have yielded maximum awards in the $50-55 per hour range. We have never asked for a multiplier or bonus. Thus, our practice is consistent with the policy we advocate today. We are prepared to accept a limitation on the Commonwealth's ability to receive attorneys' fees awards under any statute if those same limitations are applied to plaintiffs' awards."

Mr. CLARK. Senator, I think personally, just speaking on my behalf, as to the market rate, I won't quibble with you whether it's 75, 80, or 85 percent—I just think a standard needs to be set. As to a multiplier, I would be strongly against that, absolutely.

Senator DECONCINI. I tend to agree with that latter part, too, regarding the multiplier.

Gentlemen, thank you, I am sorry that we can't pursue this further, because it is very interesting talking to the real world of practicing attorneys.

Mr. BELLOTTI. Senator, could I make one last point.

Senator DECONCINI. Surely.

Mr. BELLOTTI. There are different kinds of multipliers. In antitrust cases and in consumer cases, you may pay treble damages in some cases, and that is set; even with a multiplier, it's a cap, if you pay treble damages for outrageous conduct.

Our problem with these multipliers is that there are no standards at all; they can get 50 or 100 percent, 200 percent, and there is no way you can ever control them.

Senator DECONCINI. Gentlemen, don't run off; Randy has questions for Senator Hatch. I am going to leave—I am sorry to have to do that.

Mr. WILKINSON. If it's relevant, in that Legal Services Corporation resolution battle I referred to, your general was one of the renegades with me.

Senator DECONCINI. I am very well aware; he's a very good friend of mine, I just happen to disagree with him on that, and I am glad that the good wisdom of the majority of the association believes in legal services, as they believe in doing something here.

I want to extend to the next witnesses, Mr. Shepherd, Mr. Foltz, and also to Victor McTeer, my apologies for not being here, as there are hearings going on now downstairs in the Judiciary Committee which I feel obligated to join, but I intend to look at the record, and I know Randy and Mr. Baxter on my staff here will proceed with some questions.

Thank you.

[Mr. Rader assumes the chair.]

Mr. RADER. As Senator Hatch mentioned earlier, you gentlemen represent States in the Northeast, Central, and Western parts of the country.

Could you estimate what would be a reasonable attorney's fee for a tort case in your State, computed by the hour, and also, as the leading legal representative of your State, do you feel that a rate of $75 an hour would be sufficient to attract competent counsel in Massachusetts, Arkansas, and Utah?

Mr. WILKINSON. Your question is two-part. When I hire a law firm to represent the State, because we don't have the expertise to do a piece of work in house, I always ask for a weighted average; that is, I hire a whole firm, I hire a team of lawyers, two or three, and quite often, more often than not, the junior lawyer ends up spending more time on it than the senior lawyer. And in our case, for a tort case, the weighted fee for the best law firm in town would be probably somewhere between $85 and $95 an hour.

But your second question asks can we hire competent counsel. That figure of $85 or $95 an hour is for the best firm in town I could find. I think that in our State $75 could attract competent counsel, although admittedly not the very best lawyers in town—not a Professor Tribe, for example.

Mr. RADER. General Bellotti?

Mr. BELLOTTI. We would have no difficulty at all in attracting competent counsel for $75 an hour. Ours is an urban northeast state where fees are high generally—I think the going rate in our State is anywhere from $50 to $250 to the really ultimate top counsel, someone like Jim St. Clair, that type of person would get that kind of money. The range goes way up and down and in between.

But the short answer is: I would have no problem with $75 an hour; I don't even pay that much.

Mr. RADER. Thank you. And General Clark?

Mr. CLARK. In Arkansas, $75 would attract competent counsel without question, probably the range billed by our billing fee would range from $60 to $85, maybe $60 to $90, depending on the type of case.

Mr. WILKINSON. May I amend my answer? My comments really were directed to Salt Lake City, where perhaps two-thirds of the lawyers in our State reside. Outside of Salt Lake City $75 an hour would not only attract competent counsel; it would attract the very best counsel.

Mr. RADER. Thank you. In talking with law professors on the question of ethics, we have learned that the best way to ensure compliance with ABA's model rule 1.5 governing fees is to disclose the amount of the fee in advance.

Now, as the chief lawyer for your State, how can you disclose to the State, your client, in advance the potential cost of litigation? What consequences does the uncertainty of fees liability have on your State budgets? How do you pay for it out of your state budgets? And how do you plan for these attorney fee liabilities?

General Wilkinson?

Mr. WILKINSON. I would like to respond to that, Mr. Rader, because we have had experience on that very question. We are not a State with a huge budget, and the various departments may have relatively small budgets, and when there is a case brought against them, and they know that if they lose, even if they lose just on a very small point of the case, they are going to have to pay the attorney on the other side for all of his fees, that makes them very antsy; and it has a chilling effect, to which we referred earlier, and very often they give in when they really should be fighting it to the end.

But they can't plan in advance.

We had a case where an attorney's fee award was awarded by a district court judge in our State, and it has to go to the legislature. I think our State is probably representative in that the department just can't pay it out of its budget if it has not been planned for; it has to go to the legislature and get special approval for additional money. That takes time, and, quite frankly, in our State the legislature in one case, even though I advised them that they should pay this, that the supremacy clause required the State to pay this amount, they voted not to pay it. We really faced a constitutional crisis, and that is one of the real harmful side effects of section 1988: It wrenches federalism, it gets the States hopping mad at the Federal judiciary, because the States really don't understand why the Federal Government should impose its will on a case that really doesn't involve basic civil rights, such as the *Grendel's Den* case involving the application for a liquor license.

And so, to answer your question, there is no way that the Attorney General's office can advise his client, the legislature, in advance how much the fee is going to be if the case is lost, because you don't know until the attorney's fee award is ultimately decided by the appellate court. And very often the district court will award one attorney's fee and the circuit court will cut it back greatly or even tell the district court you try it over again and come up with a greater amount.

It's just confusion.

Mr. RADER. Anything to add?

Mr. CLARK. I think it's simply a lose-lose situation; you lose in the sense, as General Wilkinson has indicated, that you can't advise your client how much the fee may be; your client will want to settle some time short of complete litigation for fear that the fee may be extracted from their budget; and then the lose aspect of it is that in my State, as in his, it takes a legislative appropriation, and that appropriation is money that comes off the top, that is money that would be going for education, health care, human service, highways, and those other issues.

And so it's a lose-lose situation as the law is now.

Mr. RADER. Thank you. We were talking a moment ago about legal services organizations.

Will the reforms that the National Association of Attorneys General has recommended deprive these legal services organizations of badly needed funds?

Mr. BELLOTTI. Not at all. Legal services is funded by a grant in our State, by the Commonwealth of Massachusetts, and I am in favor of funding legal services, but the act is not intended to fund legal services; funding shouldn't be done through the back door—you should appropriate the money, you earmark it, you don't take these shots and try to get big hits to finance legal services. Plus what happens is you are not considering at all what the cost, the overhead is, what proportion of that is legal services lawyers' salary, and you are charging for a smaller inexpensive operation these major Wall Street prices.

We had, in a case that General Wilkinson has referred to—not legal services—but $275 plus a 50-percent multiplier, $412 an hour on these liquor license cases. And that could easily be the same type of fee that could be awarded in a legal services case.

The short answer is: Legal Services should be funded as an appropriation and not through litigation.

Mr. RADER. In Senator Hatch's opening statement, he referred to the *Grendel's Den* case, in which a Harvard law professor requested, I believe, $412 an hour in fees.

General Bellotti, I am sure that you have some special awareness of the current status of that case. Could you share that with the subcommittee.

Mr. BELLOTTI. Yes, I have with me one of my attorneys, Judy Yogman, who argued that case in the first circuit yesterday.

Mr. RADER. How much time has been spent litigating that case as well?

Mr. BELLOTTI. A lot of the legal fee——

Mr. WILKINSON. By Mr. Bellotti's office, I think you are questioned——

Mr. RADER. And in general—has it been an exhaustive process, what amount of society's scarce legal administration resources are spent litigating cases like this where someone has requested $400 an hour?

Mr. BELLOTTI. Well, a great deal of time and a great many resources. Plus you are going against the same attitude—one of the things that I think has been alluded to, to some degree, here is the willingness of the Federal district court and the Federal circuit courts of appeals to give away our money, but not the U.S. Government's money. I mean, the Equal Access to Justice Act has a $75 cap, but the sky's the limit with us. We spent a lot of time not only litigating the case, but litigating the attorney's fee part of the case—but I didn't want to get into specifics of that case, because it's pending and we have had a running battle on it for a long time.

But just some of the things that you might be interested in. The professor who argued that case is a constitutional law expert—but he's not an expert litigator, it was according to him one of his first appellate arguments—and he billed for 65 hours for appearing for that argument; he also billed for $2,612 for sending a letter to schedule the case, as I would send a letter to your committee to schedule my appearance here--but I don't charge you $2,612.

Mr. RADER. I hope we don't get a bill. [Laughter].

Mr. BELLOTTI. You won't. And one of his associates billed at $125 an hour to reference a case to the Supreme Court, a one-sentence letter—and it was $625 for that letter. When he was asked——

Mr. RADER. That's a pretty good fee per word.

Mr. BELLOTTI. That's right. When he was asked why he billed so much for that letter, that one sentence, he said, well, it was a long sentence.

So you can get into really out-of-sight kind of things here. I mean, that's only one case, and it's not the most egregious; there are many, many. We had one case in our State where a prisoner in a maximum security institution brought a suit because he did not have what he felt was a constitutional level of access to the prison library. The case never, never was tried, because he escaped in the meantime, and took off. And there was a motion for preliminary injunction that was heard—and we paid a $10,000 fee for that, even though he had gone to parts unknown.

So you don't even know who the prevailing party is in these cases, and you don't really have to prevail. Someone referenced that if you can bring the case with a straight face, you have a good chance of recovering.

Mr. RADER. Thank you. We have talked some about multipliers, by which I mean enhancing or doubling of what is considered a reasonable fee in the first place.

The recent *Blum* v. *Stetson* case questioned these multipliers and found no justification in that particular case for any upward adjustment beyond a reasonable-fee computation.

In your mind, is there any justification for these bonuses? How about rewarding quality services, or compensating for particularly complex cases, or awarding fees for the risk of loss in other cases?

General Wilkinson?

Mr. WILKINSON. There is a very prominent law firm here in the city, Wilmer, Cutler & Pickering; indeed, Lloyd Cutler used to be counsel to President Carter—and, incidentally, Lloyd Cutler wrote a foreword to a recent three-volume treatise on fee-shifting statutes in which he said that this whole area is a mess. And really he is familiar, his firm is familiar with fee-shifting cases, because they had a very prominent, highly publicized case in the Washington newspapers where they recovered. It was an employment discrimination case where they went into it saying this is going to be our pro bono contribution, or part of our pro bono contribution. They went into it, they recovered a judgment for their client of some $32,000, and then they submitted a bill for $160,000.

The D.C. Circuit Court of Appeals in effect said that wasn't enough, and so it went back and finally the fee was up over $200,000, and I understand that they originally were going to donate the fee to some public interest law firm, but ended up just keeping it.

And I have to ask myself—that firm represents General Motors—I have to ask myself whether they would have charged General Motors, a standing client, a tip, meaning a multiplier. I think not. And I don't see why they should be allowed to get away with a multiplier in the case of representing just one client whom they will never represent again, as opposed to representing a standing client, like General Motors.

Mr. Clark. The concept, too, of a multiplier for excellence is a little bit of inverted logic, as I see it, of reasoning. The reasonable fee that is given, granted to counsel, whatever that figure might be, whether it's $75 or $85 or $65, is to pay for excellence in representation—that is what it is to pay for; that is to compensate a lawyer representing his client zealously, the very best the lawyer can do.

So that ought to compensate for excellence, and then if there is something less than excellence, the fee ought to be reduced; instead of the other way it ought to be reduced.

Mr. Bellotti. Plus if a case is complex, it means you just put in more hours—you are qetting paid for that by multiplying the number of hours by the hourly rate, in any event.

So there is no real justification for a bonus, and it is very, very dangerous and leaves a total absence of standards.

Mr. Rader. Thank you. General Clark, have some of the recent Supreme Court pronouncements, like the *Blum* case and the *Hensley* case, provided trial courts with sufficient guidance as to how they should compute fee awards?

Mr. Clark. I think not; I tried to indicate that to Senator DeConcini in my remarks. You can take those cases--in fact, in our discussion earlier this morning, General Wilkinson and I were talking about the *Hensley* case, and the fact it is being cited on both sides of the issue, as to terms of whether he does allow multipliers and suggestions of enhanced fees and counsel twisting it to their own benefit.

We have no standard enunciated by the Supreme Court, nothing we can follow. What we have is a standard that is in the mind of each judge, whether that is 400 or 600 district judges, and that judge sits, listens to the testimony, and unless it is egregious in terms of the abuse, overtrying a case unnecessarily, then that judge sets the standard for what is a reasonable fee. That gives us 400 standards or 600 standards.

Our experience in Arkansas is, for instance, in one district we have two judges who say multipliers just do not exist and should not exist. But the third judge, sitting in the same courtroom, says yes, multipliers have a very legitimate purpose in this type of litigation, and has awarded a multiplier of two and three on different occasions.

So I couldn't enunciate the standard in that district at all, because it rides with the philosophy of each trial judge.

Mr. Rader. Thank you. General Wilkinson?

Mr. **Wilkinson**. I believe the intention behind the enactment of section 1988 back in the year 1976 was to ensure that competent counsel would take these cases that were looked upon as being unpopular. I don't think that it was the intention to make sure that the highest paid lawyers in the country, in the Wall Street firms or the Washington, DC, firms, would take these cases.

I think that every lawyer who has worked in this area, from the standpoint of either a plaintiff's lawyer or a public lawyer, realizes that today there is no dearth of competent counsel to take these so-called unpopular cases.

So you have a market situation where competent counsel will step forward and vindicate the civil rights, where appropriate. Why do you have to hold out the incentive of a multiplier when it is not really necessary?

Mr. **Rader**. Thank you. Did you hve something more, General Bellotti?

Mr. **Bellotti**. Yes; you cannot set the standards by judicial fiat—it's going to change too much. The real heart of the problem is in the statute, and if you talk to some of these judges, even in their opinions, when you argue that there are no standards and they should not put in multipliers and they shouldn't give these exorbitant rates, they say "Your beef is with Congress, the standards should be put into the statute to give judges guidance." The judges do not have guidance, and they are all over the place now. It will never be solved judicially.

Mr. **Rader**. Thank you. Mr. Baxter.

Mr. **Baxter**. General Clark, you have referred several times to the lack of standards and having judges all over the country have different standards, and the problem that arises from that.

Wouldn't we in a certain way be substituting another undefined standard when we are talking about reducing attorney's fees for unreasonably prolonging litigation or where services were excessive? Wouldn't this bill be allowing the judges to have their own standards to reduce fees also?

Mr. **Clark**. Well, I think if you take that to its logical conclusion, the answer to that is yes. However, I think you have to look at the practical side of the application: Senator DeConcini made these remarks that in fact, in the litigation of a lawsuit—and General Bellotti referred to this, too—is the lawyer's duty to represent his client zealously and do all that needs to be done. That is a judgment call, of course, and it can be reviewed on Monday morning by someone else and make some sort of adjudication as to the propriety of that judgment.

What I have found in practice in Arkansas is that unless the situation is one that is so clearly—and I mean "abusive" is the term, I mean such an abuse that the judge is going to accept the judgment of that lawyer preparing the case. And from that standpoint I don't see that there is a real danger there of inhibiting the zealous efforts of a lawyer on behalf of his client, because that lawyer will have the opportunity to present to that court his reasoning and his judgment in terms of pursuing either that additional discovery mechanism, filing those additional motions.

The flip-flop of that is this: take the case I referred to in my comments, the creation science case in Arkansas. In that case, in which a fee was requested for $1,700,000, legal fees for 6 months basically of work for some 24 lawyers—4 lawyers in my office were involved in it, that's it. In that instance alone, at the fee hearing, when we were arguing over the fees, the sitting judge asked plaintiff's counsel: why did you move for summary judgment? Plaintiff's counsel's response was: we didn't think you would grant it.

Had that motion been made and had it been granted—I know that's all if's—but had it been granted, we would never have had the trial, we would not have had 3½ months of discovery, we wouldn't have had $50,000 bills for copying, we wouldn't have had chartered jets flying here, there, and other places.

So, in that instance, what we have is a situation where, with existing law, the lawyer just knows that there is no end out there. You just do all you want to do and say, pay me for it—and they do.

And if we follow S. 2802, and it says, if you are excessive, your fee award can be cut back, I don't think we are setting up a chilling impact whatsoever; we are just setting up a test of reasonableness, and courts have been able to adjudicate that in many standards in many kinds of cases for as long as they have existed. So I don't think there is a problem.

Mr. RADER. I would pose one final question, which is the same question which Senator Hatch posed to Carol Dinkins.

Should S. 2802 be construed in any sense as having the objective of inhibiting civil rights litigation? Do you perceive it in that way?

Mr. WILKINSON. No; I think we all have said that in our respective States, which are representative of the Union, that $75 an hour would attract competent counsel.

Mr. RADER. Thank you very much, gentlemen, for arranging your schedules to join the subcommittee today, and we appreciate your contribution.

Our next witnesses represent the American Bar Association. The subcommittee is pleased to welcome the new president of the American Bar Association, Mr. John C. Shepherd.

Accompanying Mr. Shepherd will be Mr. Thomas Foltz, the chairman of the ABA's relevant committee.

Mr. Shepherd was elected by the 380-member house of delegates in 1983 and began his term as president last month. He has practiced law in St. Louis since 1951, where he is the chief executive officer of his firm.

Mr. Foltz practices law in northern Virginia.

Gentlemen, we certainly appreciate your efforts to join the subcommittee and welcome your testimony at this time.

STATEMENT OF JOHN C. SHEPHERD, PRESIDENT, AND THOMAS J. FOLTZ, AMERICAN BAR ASSOCIATION

Mr. SHEPHERD. Well, thank you very much, Mr. Rader. It's a pleasure for me to be here. This is my first appearance before any Member of Congress since being elected as president of the American Bar Association. I certainly want to take this opportunity—but only a few minutes of your time, if I may—say we hope the appearance of the American Bar Association will always be recognized to be of service. We do not appear here as adversaries of any one, but hope that by representing the lawyers of America we can give the

Senate and the entire Congress the benefit of our knowledge and experience.

And I would also like to take a few moments, if I may, to express our gratitude for the leadership which Senator Hatch has given to several bills, which I personally am very interested in; the Bicentennal of the Constitution legislation is one; the new Child Support Act, which was just signed into law, is another. I am particularly concerned with the entire area of the rights of children in our country. In my inaugural speech as ABA president, I said that during my year, the rights of children would take a very prominent place in the attention of my administration. So for the help that I have gotten thus far, I certainly express my gratitude.

Mr. RADER. The subcommittee and Senator Hatch look forward to working with you in any way on that and other issues, Mr. Shepherd.

Mr. SHEPHERD. Thank you very much. This morning we have before us legislation which lawyers always find difficult to speak of—attorney's fees. You just heard testimony witnessed from three attorneys general representing a geographic as well as political diversity. I think we can conclude from their testimony given the diversity they represent that, unfortunately, it's always easy politics to criticize attorney's fees.

So this morning, if I may, let me shift the frame of reference of the debate. I have submitted a written statement, which I hope the committee will accept as a part of the record.

Mr. RADER. That will be made a part of the record, without objection.

Mr. SHEPHERD. I will speak to that portion of the bill which relates to the civil aspect, while Mr. Foltz, who, as you have described, is an experienced criminal law advocate will speak to the criminal law aspect. Let me say, first of all, that the American Bar Association through the years has said that lawyers' fees should be reasonable. Reasonableness is the basis upon which the service of lawyers should be compensated.

Any fee which is woefully unreasonable—as some of the examples that the attorneys general cited—should certainly be brought to the attention of the grievance committee of that particular State. And I assume, from what I have heard here this morning, that the attorneys general of the States involved have already done that, or are thinking about doing that.

Reasonableness of fees is best debated through the grievance committee arrangement setup by the States. This has always has been advocated and encouraged by the American Bar Association.

Now, with reference to setting an appropriate fee in a civil case, as I gather from what you have already heard, there is some criticism about the way the Federal judges are doing that in this country. And far be it from me to take on the brief of defending Federal judges in the very building where their appointment was approved, but if that is necessary I certainly welcome the opportunity.

I think the task of setting an appropriate fee for a lawyer who has taken on an unpopular cause in a Federal case, and has diligently pursued that case belongs to the judge. The judge can examine the record, assess what has happened, evaluate the quality of the work and the quantity of hours spent. For the judge to set the fee is probably—at first instance at any rate—a pretty good system. So let the Federal judge determine it. Or, in the instance of State court judges, let them determine it.

Such an approach would be a reminder to the citizenry that it is very important who we elect or who we appoint to the bench.

Without being argumentative about this, we are dealing with the problem of what is the fair and reasonable thing to do. Those who assert that attorney's fees won't have any effect whatever upon civil rights cases strike me as trying to have both sides of the argument. To say "I am in favor of preserving all of the great gains in the civil rights area," while at the same time saying, "I don't want the lawyers to be paid"; and then, even go on to say, "if we start paying lawyers in all these civil rights claims and broaden the influence of the civil rights statute, why, the next thing you know General Motors will he filing civil rights cases," seems to me, to be asserting inconsistent propositions.

Well, I am not here to debate that kind of an argument. We are here to discuss a very serious problem. The ABA position with reference to the civil side of shifting fees, is that it's complex and it requires additional study.

I have set out in my prepared remarks those areas of policy which the American Bar Association has already addressed. Let me conclude my oral statement by saying that, as far as the civil side is concerned, let's don't go into this thing without more preparation.

Now, my understanding is that hearings have been held and some attention has been given to this issue by the Congress through the years. But even as action by the Congress has been under consideration, there has also been a body of common law decisions evolving in the courts. So it appears appropriate to us that the combined knowledge developed by Congress and the courts be put together—not in an adversarial way, but in the way of trying to find what is the best thing to do for all of the citizens, the States, and the citizenry of those States—the individuals as well as the corporations.

There is no pressing need, in other words, to come to a quick decision on this matter during this session of the Congress.

We ask, the American Bar Association asks, that you defer the civil portion of the bill and let us work with you in a spirit of cooperation to bring before the Congress appropriate legislation to solve or at least tend to solve—the best way we know how—this complex problem that is affecting every State in the Union and every citizen of the United States.

But as to the other aspect, the criminal aspect, where the Constitution guarantees competent, adequate counsel: I think Senator Hatch himself said that the urgency for an amendment to that part of the law presses upon us. Mr. Foitz will address that element of the legislation. But I do say, and hope that the Senate will say, that these two bills, these two portions of the bill, can be separated.

I don't quarrel at all with the Deputy Attorney General. Who sees a certain entwining of the issue of attorney's fees. I am not quarreling with her suggestions, but I am saying that, in virtually every city in this country, there is a difference between the criminal court and the civil court. And in by far the most law offices in this country, there are those who handle the criminal side and those who handle the civil side.

I guess, as president of the bar, I should say it is unfortunate that too few civil lawyers pay attention to what is going on in the criminal court, but nevertheless there is that separation by members of the bar.

And so it would be appropriate for the Senators to deal first of all and immediately with the question of attorney's fees in those cases where lawyers are appointed to represent the criminal defendant and defer till a later time those cases where the civil issues are involved.

And that is the position that I would urge upon the Senate. And I also urge you to hear my good friend and hard-working lawyer, Tom Foltz.

[The following was received for the record:]

PREPARED STATEMENT OF JOHN C. SHEPHERD

Mr. Chairman and members of the Subcommittee: I am John C. Shepherd, the President of the American Bar Association. I am accompanied today by Thomas J. Foltz, a practicing lawyer from Alexandria, Virginia. We welcome this opportunity to present the views of the Association with respect to the Legal Fees Equity Act, S. 2802.

Our testimony today will, of necessity, focus on those provisions in Section 6 of the bill which would amend the Criminal Justice Act of 1964. The Association has adopted various policy positions over the years dealing with fee awards and fee-shifting in civil cases, and those will be described briefly below. However, due to the short time that has elapsed since S. 2802 was introduced, the Association has not had the opportunity to analyze thoroughly the detailed civil provisions of the bill. I will briefly relate to you those existing policy positions with respect to civil awards, and then Mr. Foltz will discuss in some detail the important concerns that we have with respect to the Criminal Justice Act provisions. We will, of course, refer the civil provisions of S. 2802 to groups within the Association and may, at a later date, be in a position to offer definitive comments on these provisions. We are fully prepared today, however, to address the Criminal Justice Act provisions. We believe that, unlike the situation with the civil provisions, the case for immediate amendment of the Criminal Justice Act is clear, convincing and universally accepted. We would urge that your subcommittee move promptly to report legislation to amend the Criminal Justice Act, reserving those aspects of S. 2802 dealing with civil fee awards for further consideration in the next Congress.

I would now like to summarize briefly the Association's existing policy positions with respect to the fee awards and fee-shifting in civil cases:

(1) We support legislation to permit the courts and administrative agencies to award reasonable attorneys' fees to a party prevailing in litigation against the federal government where (a) the action results in a substantial public benefit or enforces an important public right and (b) the economic interest is small in comparison to the cost effective participation or the party does not have sufficient resources to compensate counsel adequately. Thus, we would generally be opposed to those provisions of S. 2802 that provide for the reduction or denial of attorneys' fees and related expenses in public interest cases against the federal government.

(2) We oppose amending the Equal Access to Justice Act to limit awards of attorneys' fees by imposing requirements that (a) a particular monetary amount have been at issue in order for an award to be made, (b) an award be "proportionate" to the amount in controversy, or (c) an award be based exclusively on a particular attorneys' "routine and customary" rate.

(3) We oppose the imposition of arbitrary and unreasonable limits on the hourly fees for private attorneys that may be recovered from the federal government under fee-shifting statutes.

(4) We have adopted standards in our Model Rules of Professional Conduct for determining the reasonableness of attorneys' fees (Rule 1.5). These standards, a copy of which is attached, build upon widely-recognized principles which enjoy a wide degree of acceptance by both the Bench and the Bar. They provide a useful model

for a system of attorneys' fees utilizing a flexible approach for determining the fees appropriate to each unique situation.

While we have not had the opportunity to study the civil fees provisions of S. 2802, we have scrutinized the problems with the Criminal Justice Act and believe action to correct the deficiencies in that Act is urgently needed. I would note that few issues in our Association have generated such widespread interest and support within our Association as has the Criminal Justice Act issue because of the realization that the rights of the accused are jeopardized when counsel fees are so grossly inadequate. Such diverse groups as the Section of Criminal Justice, the Section of General Practice, the Young Lawyers Division and the Standing Committee on Legal Aid and Indigent Defendants have all been deeply involved in the issue. I commend Mr. Foltz's committee on this subject to you.

RULE 1.5 FEES

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably is writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcomne of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Mr. RADER. Thank you very much, Mr. Shepherd. Mr. Foltz?

STATEMENT OF THOMAS J. FOLTZ

Mr. FOLTZ. I appreciate the kind words on behalf of President Shepherd, and I appreciate the opportunity to testify here before you, Mr. Rader, and I would like to simply state for the record that I would move the admission of my written statement.

Mr. RADER. It will be included in its totality.

Mr. FOLTZ. I will try to summarize, if I may, what I believe to be the basic kinds of issues we face here. I am a general practitioner in Alexandria, VA. I am chairman of the committee on delivery of legal services of the ABA section of general practice.

But I am here today not simply on behalf of that section but on behalf of what I would characterize as one of the broadest movements within the American Bar Association to date, to seek reform in Congress for a crisis in representation of indigents.

The association's position has been well known on this; over the last 5 years there have been at least six or seven resolutions which have approved increases in funding, have asked for a center for defense services, all of which has been well known and which is very well summarized in my testimony.

The reason for that is because our members live and work in communities and they see what's going on, and they understand something about the history of the issue of appointed counsel.

The last amendment of this bill, in 1970, the last time rates were raised, indicated that the reason rates were raised is because defendants often did not have the resources to obtain counsel, and the compensation was intended to ease the financial burden on the attorney who offers his services to a defendant as a professional public duty. That interpretation and that congressional finding was in fact amplified by the Supreme Court in 1979, where the Supreme Court said, in *Ferri* v. *Ackerman,* that there is evidence that unpaid and appointed counsel were sometimes less diligent or less thorough than retained counsel, and therefore, the Court observed, the Congress was right to conclude that reasonable compensation would improve the quality of representation of indigents.

Now, the problem simply has been that the current rates have not been raised since 1970, and that because of that certain definite consequences have ensued.

CJA fees are often 25 percent of those in similar private cases. Relief under the CJA for payment in excess of the now current statutory maximums of $1,000 in a felony case and $400 in a misdemeanor case is rare.

In my testimony I have indicated that out of 22,000 private appointments in 1978, "excesses" or fees over the maximum were granted in only 313 felony cases and about 60 others.

But perhaps the most telling aspect of where we stand today on this issue is the fact that the Judicial Conference of the United States has indicated that of 85 percent of judicial districts surveyed, there is difficulty in finding competent counsel and that the rates are unrealistic and unfair.

We are not talking here today about a group of lawyers seeking to line their pockets; we are talking about a judicial reaction to a crisis. We join with those judges in observing that these rates are unfair and that they impose an unrealistic burden upon us.

When you add that to the fact that in the last 2 to 3 years there have been substantial cutbacks for civil legal aid, both public and private, all of a sudden we have a profession in crisis, because it is trying to meet too many burdens.

In contrast to the earlier testimony here this morning, I can assure you that there aren't that many practitioners who can avail themselves of what the complaints this morning were about—high rates. We are talking about struggle, we are talking about the allocation of burden, we are talking about the vast majority of practitioners.

It is an unfortunate situation and it is one that needs to be remedied. The impact is overwhelming. I find that the findings in 1970 by Professor Oaks, who was then a professor and recently a Utah Supreme Court justice apply today. He indicated that there was a distinct relationship between the level of compensation and the quality that could be expected of appointed counsel.

Federal district courts have recognized this, and it seems to be the prevailing sentiment from both the bench and the bar that attorneys recognize that they have an obligation to represent indigent defendants; they also recognize that they have a substantial public service burden. But what they are saying here today is they cannot be unreasonably damaged by their willingness to serve the public. We don't want to be in the business of perennially subsidizing the representation of indigents; we can't afford it, it's just impossible to do the right kind of job.

Lawyers are on the horns of a dilemma. On the one hand, they must look to the obligations that the Constitution imposes upon them; and, on the other hand, they must ask themselves how they are going to proceed against a relatively well-funded prosecution that can oppose their efforts time and time and time again to seek representation.

I can tell you some stories that I have been through—and they are in my testimony. But one of the ones that sticks in my craw, one of the ones that I don't have in my testimony that I am going to offer now is a situation in which I took a State court defendant, represented him on a drug possession charge, brought a motion to bar the prosecution on a double jeopardy basis, lost the appeal at the State court level with the simple denial of a writ, was so incensed that for free I went ahead and filed a writ of habeas corpus in the Federal district court, and the district court granted the writ and said that the prosection was barred by the double jeopardy clause of the Constitution. I thought I would let the matter end there.

But no. It was the attorney general of the State of Virginia who called me and said that they had to appeal it and take it on up. Now, eventually, I got compensated for the appeal instituted by the State under CJA rates to go to the fourth circuit. But I wasn't the one who caused the cost in that situation; I was willing to let the matter lie. But they didn't want to—and I won, and they didn't even bother to file a writ of cert. with the U.S. Supreme Court.

So what I am saying to you here today is that when I go to the wall for somebody because they are innocent or because I believe there is a legal principle involved, it's costly, and I am not asking to line my pockets; I am simply asking for an even break.

And if you think the situation is bad in the Federal system, it's worse in some States. In Virginia, I defended a man on a first-degree murder charge who protested to me his innocence, said he was innocent—I took it to trial, I had four witnesses, the Commonwealth had two, I had a character witness, an eyewitness to the shooting who saw somebody else do it, I had an alibi witness, and the jury acquitted him in 20 minutes after a 1-day trial. The case took me 70 hours of running around, of motions, of investigation, and for that I got the grand sum of $675—$75 for the preliminary hearing, $200 for the firearms charge, and $400 for the murder.

And when I asked the prosecutor why did you hit him with two felony counts when you had him on the murder, he said: "well, I wanted to give you more money, because in Virginia you get paid by the case."

Now, I don't know whether Virginia ranks among the lowest, but I assure you that it does, and I can tell you that if you raise the Federal rates and raise the ceilings, we are going to have a beneficent effect in the States; it's going to be real hard to justify, it's going to be real hard to sit there and say we have to have a great disparity in the State and Federal systems. Perhaps that's a touchy issue but I can't help but think that if you raise the rates, it's going to help a lot of folks, not just in the Federal system, but in the State system as well.

I would add as well that at this point there is an unhealthy tension between the Bench and the bar with regard to taking these cases in the Federal system. I have been called on many occasions by the clerks asking me personally to take a complicated case; I do it and I do it willingly, but it costs, it really does. I believe most of my clients are innocent—that probably makes me a rather unusual criminal lawyer. But I believe also that the Government overcharges in many instances, and I believe also that they fight me tooth and nail, sometimes informally admitting to me that they enjoy the fight because I am the only court-appointed attorney around that gives them something to do, and they come back at me time and time again so I have to hit them with more and more paper—and paper costs money. I am not talking about sitting in court and racking up the hours; I am talking about the overhead I have to pay, pay a secretary to crank out the paper to oppose them so I can file the mandatory five pretrial motions I need to avoid the problem of perhaps a writ against me for ineffective assistance of counsel.

So that is why it's costing more. I just barely break even on that, I just barely break even when I "max out." And the judges are beginning to recognize that. As I have indicated in my testimony, I got a phone call from a judge after a 2½-day jury trial in which I put in an $1,800 voucher, and I had a substantial amount of pretrial work. He said I know you did a good job, I know he got found guilty. But that was the second time around. The first time around for that client—and I did get paid for that I think the magnificent amount of $800, after about $1,000 or $1,200 worth of work on a voucher—the Government dismissed the case at the last minute, and it was their opposition that caused the fees to go up.

I don't take a case to the wall unless I am meeting stiff opposition, but I do have to file mandatory motions, I do have to go to work for my client, and I can't do it under the current rates.

Now, we are happy—and, please, I am ecstatic that there is a proposal here to double the rates—but I have to say that that simply isn't enough, and I don't mean to sound greedy. And my reason for saying that is essentially that if we use a simple cost-of-living adjustment, we have to take the rates from 1970 up to $53 for out-of-court time and $83 in court, and you would have to put a ceiling on it of $2,660 for felonies and $1,064 for misdemeanors.

Now, we think that there is another bill out there that does a better job, and it's quite clear from my written testimony what we think that bill is—H.R. 4307.

Now, why are we in favor of that? Because it provides flexibility, the very thing that we are talking about throughout the whole question of the award of attorney's fees here today, flexibility. We are not talking about unreasonable flexibility, we are talking about what the judicial counsel can do to set the rates within given locales, within districts, within circuits, and the reason for that is that the cost of practicing law varies substantially.

But S. 2802 doesn't deal with that as much as we would like, doesn't go to that. I believe that what we have here today is a need for going toward the maximums in H.R. 4307 and S. 2420.

Why is that? It is because the number of hours available that you have to work on a case, on a complicated felony, where there is a lot of factual investigation to do, where there is a lot of witness interviewing to do, and you can't simply rely on investigators. It takes a number of hours that you are going to have to work above 30. When you double the rates and double the hours you are still at about 30 hours for work on a felony. And depending on what kind of cooperation you get from the Government, what kind of documents they are willing to make available to you right away, what they are willing to do with you, you can either spend that time very quickly and very efficiently and thus try to make use of the 30 hours allocated to you mostly for trial, or, if you get some relatively green special assistant on the other side who wants to play games and waltz you around, whatever, and you have to go back and forth to his office because he doesn't have the documents together, then I have eaten up the time available to go to trial.

Add to that the fact that in a great many instances clients are found guilty, although not of everything they are charged with, you still have a tremendous burden at sentencing.

Now, I argue sentencing almost as hard as I argue a trial, because in the Federal system the jury makes the determination of guilt or innocence, and the judge virtually acts as a one-person jury on sentencing. So it is your one best shot at that, and you have to put together an allocution memorandum, and that means doing a little case research. And when I have done that, I have done better than the Government, and I consider that to be the mark of excellence. Usually it takes two of them to take me out. When I get in on a case, it usually takes two of them by the time they are finished. I can start trying the case against one of them, but sooner or later they have to call in somebody more senior—and I am proud of that. But it's costly. And I am doing my best for these folks, because there are a lot of them out there, and that is one thing that substantially does not appear anywhere within my testimony, but does appear within some of the ABA documents which I have had an opportunity to review, the Standing Committee on Legal Aid to Indigent Defendants estimates that as of 1971–73, 3½ million people are going to go through the court-appointed system, and that is an awful lot of people to whom to deny the promise of effective assistance of counsel and equal protection under the laws.

Now, I am not the only one here today; I am here on behalf of the American Bar Association, I feel somewhat unrepresentative.

But I can tell you that there have been an awful lot of people who have worked on this issue within the association, and I am not going to take the sole credit for testifying here today. I am here today because I can tell you what's going on, and I can tell you what our needs are, and I can tell you what's happening; and I can also tell you that as I sit here today I have approximately 400 letters. Now, admittedly they are from about 55 attorneys and they blanketed some critical Senators, but the point remains that there is a substantial agreement out there—and by "out there" I mean beyond the other side of the Potomac. People want to see reform, attorneys want to see reform, clients want reform, judges want reform. There is no compelling reason I can see to link reform of the Criminal Justice Act with reform of civil attorneys' fees. The level of crisis—and I do mean crisis—is severe in the criminal justice area; it's so overwhelming—it's been 14 years, and I am not here pleading a special place to increase my wallet. All I am asking for is the resources to fight fairly for my clients so that we can do the right kind of job under the Constitution.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF THOMAS J. FOLTZ

Mr. Chairman and Members of the Subcommittee: I am Thomas J. Foltz, a lawyer in private practice in Alexandria, Virginia, and the Chairman of the Committee on Delivery of Legal Services of the ABA's Section of General Practice. I, too, greatly appreciate the opportunity to appear before you on this important legislation. My testimony will be devoted to the Criminal Justice Act issues raised in Section 6 of S. 2802.

Over the years, the Association has repeatedly advocated that constitutional guarantees of effective assistance of counsel be fully and fairly implemented. The Sixth Amendment of the Constitution, as intepreted in a long line of Supreme Court decisions, guarantees the right to counsel in most criminal cases in which the deprivation of liberty could result. Yet that guarantee is often not met, or met on an inadequate basis, principally because there has been inadequate funding for defender services.

In the last five years alone, our Association has taken the following policy actions in this area:

Supported the creation of an "independent federally-funded Center for Defense Services for the purpose of assisting and strengthening state and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the defense of poor persons in state and local criminal proceedings" (February, 1979);

Recommended that the Supreme Court "adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel" and further recommended that the Criminal Justice Act "be amended to provide for the payment of adequate compensation to counsel appointed by the Supreme Court to prepare and file petitions for discretionary review in state death penalty cases" (February, 1979);

Urged the states "immediately to take the actions necessary to provide effective assistance of counsel to indigents accused of crime" (August, 1981);

Urged "the Congress of the United States to increase, or provide a mechanism for administratively increasing, the per hour and maximum total amount of compensation authorized under the Criminal Justice Act of 1964 so that the attorneys receive reasonable compensation in accordance with prevailing standards" (February, 1982);

Supported in habeas corpus matters "the prompt availability of competent counsel for both state and federal proceedings, essential in many instances to enable the federal courts fairly and expeditiously to evaluate the merits of a claim presented in a habeas corpus petition" and emphasized that "compensation of counsel for the representation of habeas corups petitions should be made at a fair rate of payment" (August, 1982); and

As part of a comprehensive set of recommendations of steps which should be taken to deal with the crime problem, stated: "Greater financial resources should be allocated by the states and the federal government in order to provide adequate funding for indigent defense services. Furthermore, the American Bar Association should continue to support and press for the creation of a national Center for Defense Services" (February, 1983).

Thus, we strongly believe that reform in this area, which is a vital component of the overall criminal justice system, is urgently needed. Our members, who live and work within the system on a day-to-day basis, know this from first-hand experience. But the overall problem has been well documented elsewhere.

The House Report which accompanied the last revision of the Criminal Justice Act (H.Rep. 91-1546) stated that its passage was a recognition "that defendants often did not have the resources to obtain counsel . . .," and that the "compensation was intended to ease the financial burden on the attorney, who offers his services to a defendant as a professional public duty." The Supreme Court reviewed the legislative history of this Act in *Ferri* v. *Ackerman,* 444 U.S. 193 (1979), and concluded that it had been passed "(i)n response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel . . ." and therefore "Congress concluded that reasonable compensation would improve the quality of the representation of indigents."

Unfortunately, this recognition has not resulted in rates of compensation that are currently adequate or reasonable. Last amended in 1970, the rates set by 18 U.S.C. Section 3006A9(d) (2) now provide for miximum compensation of $1,000 for a felony case and $400 for a misdemeanor, and hourly rates limited to $30 per hour in court and $20 per our out of court. Since the Consumer Price Index has nearly tripled since 1970, private attorneys must not generally subsidize such representation. Increased office overhead, the need to present a comprehensive and effective defense including the filing of virtually mandated motions, the possibility of lengthy trials, and the presence of a relatively much better funded prosecution having far greater investigative resources place enormous, almost insurmountable burdens on defense counsel.

The consequences of letting these rates sit since 1970 have been severe especially in light of other developments. Let me indicate what has happened.

Studies show CJA fees are often 25% of those in similar private cases.

Relief under the act by means of excess payment certified by the trial court is rare. For example, in 1978, of nearly 22,000 private appointments, excess compensation was granted in only 313 felony cases and about 60 others.

The Judicial Conference in 1983 indicated nearly 85% of judicial districts surveyed either found difficulty in obtaining competent, experienced counsel or felt that the rates were unrealistic and unfair.

Federal District Courts therefore now recognize that the level of compensation and quality of representation are linked. Low compensation all too often creates low quality. The result is damaging not only to the person accused of a crime but to the justice system as a whole. There is "growing concern among federal judges, for example, that the courts will soon be faced with a rash of 2254 and 2255 claims from convicted defendants who have been represented by allegedly unqualified Criminal Justice Act attorneys.

Within the last two or three years private attorneys have been called upon to pick up the slack in civil pro bono systems as funding has decreased for both privately and publicly funded civil legal aid. While attorneys have been generous in the donation of their time, there are very real limits to what they can do on a volunteer basis. Society as a whole must bear its rightful share of the burden to provide effective assistance of counsel, particularly where such assistance is mandated by the Constitution.

In 1970, when the rates were last raised, Congress recognized the relationship between levels of compensation and quality of representation by relying on a report prepared by then Professor, and more recently Utah Supreme Court Justice Dallin H. Oaks. The report was commissioned by the U.S. Department of Justice and the U.S. Judicial Conference. Addressing principally the Federal Public Defender system, the Oaks report also found "that the single most important factor in determining the quality of service under the Criminal Justice Act is the degree of experience of the C.J.A. lawyers being appointed in the district." The report determined that "the availability of compensation and other resources under the Criminal Justice Act can be of great significance in aiding the district court in making better use of its own resources, including principally the experience of its Bar. . . ."

As you can see, that report and its observations have been borne out over time. In *U.S.* v. *Quintero-Medina,* 489 F. Supp. 82 (1980), the court stated:

"Lawyers who devote their substantial talents to the defense of indigent persons accused of crime are entitled to equal treatment. Unfortunately, the Congress has placed and retained an unreasonably low limit on the rate at which these lawyers may be compensated from public funds. But certainly all of their time should be compensated at those low rates, when close scrutiny of that time reveals it was reasonably and necessarily spent on the defense of the assigned, indigent defendant. To do less would be to relegate those who defend persons accused of crime to a second class status and to fail in our statutorily implemented Sixth Amendment commitment to the indigent accused that they will receive professional representation of a quality comparable to that available to those who are able to retain experienced, able counsel."

A clear majority of attorneys recognize their obligation to represent indigent defendants at rates less than they could normally charge private clients. Assuming that attorneys should make significant pro bono contributions, it does not necessarily follow that their private practice and profession should be damaged by their willingness to serve the public.

It should also be pointed out that attorneys who become proficient in the area of criminal law are relatively few in number. The appointment to represent an indigent defendant, both at the state and federal level, falls upon the shoulders of only a small percentage of the bar. To represent an individual whose freedom is at stake requires a great expenditure of time and emotional energy. I think there will continue to be a lingering doubt as to whether or not attorneys who have to make significant financial sacrifices provide the most diligent and competent representation of their clients.

We face, in my view, a real crisis in this area. Experienced attorneys, knowing they will lose money at best and at worse face a serious financial strain, do not accept these cases readily. I have cited judicial, academic and prior legislative analyses of the very serious problems involved here. Now I would like to supplement that data with the following experiences from my own practice.

A growing judicial recognition of the low fees. I recently finished a two and one-half day jury trial defending a client who had no prior record against nine counts of conspiracy; the court dismissed two of the nine counts and imposed a two-year sentence for seven counts. The judge called me to tell me that I had done a good job, but that, although I had put in a voucher for $1,800, he could not certify it for excess of $1,000 payment because of an apparent informal three-day trial rule. He said he knew it was a sacrifice and he appreciated it. I cut no corners on that case and I should also mention that that trial was the second go-around. Prior to the nine-count indictment I defended the same client on a six-count indictment which I had dismissed on the morning of trial after a substantial number of pretrial motions, appearances and negotiations with the Government. I now have trouble juggling for a while my rent, copying, phone and book bills. My first creditor seems to be the court. When a man says he is innocent, I will generally tell everyone else to wait. That is why I am a lawyer. But it is not easy.

A growing pressure on increasingly fewer lawyers to take these cases. Judges or clerks of the court frequently call personally upon more experienced practitioners to have them defend in the multi-count, multi-defendant case. While this is an informal badge of honor and cannot hurt one's reputation before a court with a relatively small number of judges, it creates real economic dilemmas when done successively. I know. I have been called. I quickly go at their call, but I cannot go as often or as far as justice may always require.

A secondary fee market may emerge. Once after obtaining thirty days upon a plea to a misdemeanor for a client who was initially charged with thirty years on two felony bribery counts, the client's friend jokingly offered me additional compensation at the conclusion of the case because he knew how little I was being paid. I declined and I went immediately to the probation officer to disclose the offer of compensation. What was jokingly offered to me may be seriously offered to others—and I am sure turned down. What is important is that the public has lost confidence in the attorneys *per se*; "court-appointed attorney" in many eyes may now be a term of derision. Clients cannot be forthcoming if they have no confidence.

A short-changing of advocacy at sentencing may occur. Generally in a serious case involving multiple counts, many Government witnesses, a complicated fact pattern, substantial pretrial motions, and a lengthy trial, practitioners may "max out" at the $1,000 limit somewhere into the first day of trial. Subliminal abandonment of sentencing advocacy may occur if the client is found guilty or even some counts are dismissed. I know. I have fought this tendency in myself and have resisted it; but it has often not been easy.

Most of these trends are confined by a recent article by a member of the Texas Bar who indicated that, because of increased overhead in the business of practicing law, taking court-appointed cases, at the present level of compensation, does result in a substantial loss to the practitioner. But the most important impact is upon the clients.

We are pleased, therefore, Mr. Chairman, that the legislation you have introduced for the Administration recognizes the gross inadequacy of the current rates and seeks to address the problem. A doubling of the hourly rates and of the per-case maximums on compensations is definitely a step in the right direction. We believe, however, that significant further improvements can and should be made in the CJA rates and processes, particularly in light of the history of extremely sporadic review and adjustment of these rates. In this regard, it should be noted that in terms of 1970 real dollars, current rates would need to be set at $53 for out-of-court time and $80 for in-court time. Further, the ceilings on per-case compensation would need to be raised to $2,660 for felony cases and $1064 for misdemeanors simply to bring them up to their 1970 equivalents. Thus, the case for even higher rates is quite strong, as is the case for providing flexibility in the rate structure.

There are a number of approaches which can be taken to provide greater flexibility in the rate structure. The current Act, for example, provides in 18 U.S.C. Section 3006A(d)(1) that the Judicial Council of a given circuit can set rates other than those specified in the statute. S. 2802, unfortunately, would delete this provision. While this authority has been used rarely, we believe it is a desirable safety valve and should be retained.

The House-passed bill to amend the Criminal Justice Act, H.R. 4307, and its Senate counterpart, S. 2420, provide two other approaches to the flexibility issue, both of which we find meritorious. First, they provide that rates may be raised above the $50 per hour ceiling set in those bills if "the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit . . . ," recognizing that the cost of practicing law will vary from locale to locale.

Second, H.R. 4307 and S. 2420 address the problem of sporadic congressional review by providing that "not less that three years after the effective date of the Criminal Justice Act Revision of 1984, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule . . . on or after such effective date." While other formulations could be devised, such as tying the rates to the Consumer Price Index, we believe this approach is a reasonable and desirable one.

We also favor those provisions of H.R. 4307 and S. 2420 which provide that the Director of the Administrative Office of the United States Courts shall provide representative or liability insurance for employees of the Federal Public Defender Organization and the Community Defender Organization, and the authorization for appropriations for the continuing education and training of persons providing representational services under the Act. We recommend the inclusion of similar provisions in your bill.

In conclusion, we believe there is a compelling case for prompt and significant action to revise the Criminal Justice Act. We would urge this Subcommittee, the full Committee and the Senate to pass legislation this year to amend the Act, leaving the more complex issues surrounding the award of attorneys' fees in the civil area until a later date so that they can receive the fullest possible consideration.

American Bar Association

GOVERNMENTAL AFFAIRS
GROUP
DIRECTOR
Robert D. Evans
STAFF DIRECTOR FOR
GOVERNMENTAL LIAISON
Craig H. Baab
STAFF DIRECTOR FOR
BAR LIAISON
Kevin J. Driscoll
STAFF DIRECTOR FOR
MEMBER LIAISON
Irene R. Emsellem
LEGISLATIVE
COORDINATORS
Lillian B. Gaskin
Denise A. Cardman
Maurice A. Barboza
STAFF DIRECTOR FOR
INFORMATION SERVICES
Peggy A. Richter
EDITOR,
WASHINGTON LETTER
Rhonda J. McMillion

September 19, 1984

Randall R. Rader, Esquire
General Counsel, Subcommittee on
the Constitution
212 Dirksen
United States Senate
Washington, D.C. 20510

Dear Randy:

Thanks for your assistance in the scheduling of our witnesses at the September 11 hearing on the Legal Fees Equity Act.

During your questioning of Tom Foltz, you asked him if he could provide information on two subjects: (1) the rates of pay in the 50 states for court-appointed counsel and (2) the number of attorneys handling CJA cases each year. With respect to the first item, I am enclosing an appendix to a 1982 report, "Criminal Defense Services for the Poor," which provides information for each state on the rates that were being paid when the research was done. With respect to the second item, I have asked Theodore Lidz, Chief of the Criminal Justice Act Division of the Administrative Office of U.S. Courts, to assemble whatever data they have on this subject so that I may forward it on to you. I expect to receive this information shortly.

I hope that a means will be found to separate the CJA provisions and process them this year; the increases are badly needed.

Thanks again.

Sincerely,

Robert D. Evans

Enclosures

cc: Thomas J. Foltz, Esquire

Part One

CONSTITUTIONAL DUTY, DEFENSE SERVICES, AND FUNDING

A. The Right to Counsel

The United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense."[1] During the past fifty years, in a series of landmark decisions, the United States Supreme Court has defined the scope of the right to counsel in state criminal proceedings for a person too poor to hire an attorney. In 1932, the Supreme Court held in Powell v. Alabama[2] that an indigent person charged with a capital offense must be afforded the right to counsel. The right to an attorney was extended to all state felony prosecutions in the now famous 1963 decision of Gideon v. Wainwright,[3] and, in 1972, in Argersinger v. Hamlin,[4] to misdemeanor cases in which the accused suffers a loss of liberty. Protection of the sixth amendment guarantee of counsel also has been applied to juvenile delinquency proceedings,[5] to appeals,[6] and to other situations as well.[7]

---

[1] U.S. Const. amend. VI.

[2] 287 U.S. 45 (1932).

[3] 372 U.S. 335 (1963). Gideon overruled Betts v. Brady, 316 U.S. 455 (1942), in which the Supreme Court had held that the right to counsel does not extend to all felony cases, but only where denial of counsel would be "shocking to the universal sense of justice." Id. at 462.

[4] 407 U.S. 25 (1972). See also Scott v. Illinois, 440 U.S. 367 (1979) (constitutional right to counsel does not extend to misdemeanor cases where only a fine is imposed). Where the right to counsel exists, a defendant may elect to proceed without an attorney. However, defendant must make a knowing and intelligent waiver of counsel in such cases, and should evidence an understanding of the charges, punishments, defenses, and other essential facts of the case. Johnson v. Zerbst, 304 U.S. 458 (1938); Von Moltke v. Gillies, 332 U.S. 708 (1948). Assuming a knowing and intelligent waiver of counsel, a constitutional right to self-representation is available. Faretta v. California, 422 U.S. 806 (1975).

Each state sets its own standards for determining indigency. In 1971 the FBI reported over seven million adult felony and non-traffic misdemeanor arrests. Of this number, almost 3.4 million were found unable to afford counsel and required public representation. National Legal Aid and Defender Association, The Other Face of Justice 70-71 (1973). Although national statistics on the number of indigent persons requiring public defense are not available, undoubtedly the number is far larger than it was in the early 1970's.

The Supreme Court's right to counsel decisions are aimed at securing fair trials for all accused persons, rich and poor alike. As the court explained in Gideon:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[8]

---

[5] In re Gault, 387 U.S. 1 (1967) (right to counsel applies to juvenile delinquency proceedings that result in confinement).

[6] Douglas v. California, 372 U.S. 353 (1963) (state required to provide counsel to indigent defendants on first appeals of right). But see Ross v. Moffit, 417 U.S. 600 (1974) (counsel not required to assist indigents on appeals to intermediate state appellate courts or on petitions for writs of certiorari to the United States Supreme Court).

[7] United States v. Wade, 388 U.S. 218 (1967) (right to counsel at critical stage of post indictment lineup); and Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel at critical stage of preliminary examination).

[8] 372 U.S. at 344.

of the bar who have expertise in criminal defense.[50]

Unfortunately, when compensation for assigned counsel is inadequate, private attorneys are sometimes unwilling to accept appointments or unwilling to put forth all necessary efforts on behalf of their clients. This has been documented in site visits conducted for this report,[51] and in other studies of defense programs.[52] The problem also has been illustrated in a number of appellate court decisions. For example, in a case decided by the Supreme Court of West Virginia, a defendant was held to have been denied effective assistance of counsel because his attorney refused to move for a mistrial solely for personal economic reasons.[53] At a hearing after the trial, the appointed lawyer admitted that he refused to seek a mistrial, even though he believed it fully justified, because he did not want to have to try the case again. In reversing the conviction, the court conceded that defense consel probably "was victimized by an unsatisfactory system of providing counsel for indigents,"[54] but that this was no excuse for counsel's failure to represent his client fully. In a North Carolina case in which the death sentence was imposed, defendant's appointed attorney refused to file a petition for certiorari in the United States Supreme Court unless promised payment from the state for doing so.[55] The attorney took the unusual step of expressing his views in a letter addressed to the Chief Justice of the North Carolina Supreme Court:

> I am not an Eleemosynary Institution.
>
> * * *
>
> Unless an Order is entered by some judicial official in the State of North Carolina to compensate me, on a reasonable basis, for services to be rendered in perfecting ... [the] appeal to the United States Supreme Court, I cannot justify working for nothing or at a rate less than that received by a garage mechanic.[56]

---

[50] In recognition of this fact, the ABA recommends wide distribution of assigned cases among all members of the bar who are qualified to render criminal defense services. See ABA Providing Defense Services, Standard 5-2.2 (emphasis added).

[51] See particularly comments of lawyers made during interviews in San Francisco, California infra at 39; Tuskegee, Alabama infra at 41; and Vancouver, Washington infra at 54.

[52] See, e.g., summaries of defense studies in Appendix F conducted in Alabama, California, Kentucky, Maine, and Massachusetts.

[53] State v. Pelfrey, 256 S.E.2d 438 (W. Va. 1979).

[54] Id. at 441.

[55] In the Matter of Hunoval, 294 N.C. 740, 247 S.E.2d 230 (1977).

[56] Id. at 741, 247 S.E.2d at 231.

The conduct of the attorneys in the foregoing cases (and in the other examples cited in this report), though disappointing, are not surprising. It would be comforting to believe that due to a sense of professional duty all lawyers bring to bear the same measure of dedication and zeal regardless of the amount of compensation. Lawyers, however, are human, and many respond in very human ways, with a keen awareness of the economics of law practice. Studies conducted in other areas of employment support the proposition that performance and productivity are directly related to the adequacy of compensation:

> In sum, there is a substantial amount of evidence to support the prediction ... that tying individual performance to financial rewards results in increased motivation, which under most conditions results in increased performance. The evidence to support this proposition comes in all shapes, sizes, and qualities. Much of it comes from studies of poor quality that used only before-and-after measures, but some of it comes from rather carefully controlled laboratory experiments.[57]

The trend of appellate court decisions in recent years has been to recognize that lawyers appointed to represent indigent defendants are entitled to compensation.[58] Also, virtually every state now has a statute

---

[57] E. Lawler, Pay and Organizational Effectiveness 124 (1971). Much research has been conducted on the subject of remuneration and quality of job performance. See E. Lawler, Pay and Organizational Development (1981); E. Jacques, Measurement of Responsibility: A Study of Work, Payment, and Individual Capacity (1973); and Fenker, "The Incentive Structure of a University," 48 J. of Higher Educ. 453 (1977).

[58] In Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972), the Supreme Court of Kentucky held:

> It is in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously and efficiently. Therefore, it appears elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation.

Mr. RADER. Thank you very much. I am certain that no kind of litigation puts a litigant's liberty and civil rights more at stake than a criminal trial, and I am struck by the gross incongruity of your working 70 hours for $600, less than $10 an hour on a criminal case, with someone's liberty at stake, as compared with someone requesting $412 an hour to litigate a liquor license case. There is certainly disparity there that bears the investigation of the subcommittee further.

We certainly agree that the Criminal Justice Act needs revision. Could you supply us with what are the average hourly rates that the various State governments compensate lawyers appointed to represent indigent criminal defendants?

Mr. FOLTZ. If I may for the record indicate that the best compilation I have, again, is the 1982 report by the standing committee on legal aid and indigent defendants and I would be more than happy to submit that.

I have spoken with Mr. Evans, our legislative director at the ABA, and he assured me that the State statutory survey contained in that publication may need some updating and that the movement in fees indicated there indicates some minor inflationary adjustments.

If you examine that—and I spent one long evening looking at that chart—I believe you will find that there are about 29 States that currently pay more on the hourly level than the current Federal $20 and $30.

Mr. RADER. What does Virginia pay?

Mr. FOLTZ. Virginia pays on a spot basis; I get $200 for a felony up to 20 years, $400 for a felony over 20 years in sentencing.

Mr. RADER. It's not on an hourly basis, but on a per-case basis.

Mr. FOLTZ. It's ostensibly on an hourly basis—in all fairness, I will say they have tried to institute a new system by which they keep track of your hours, and they say that that is at $30 an hour. But that is just new and it's not by legislative amendment; it's simply a matter of administrative procedure, apparently administered by the supreme court of Virginia. I get $75 for a preliminary hearing.

Mr. SHEPHERD. Speaking on behalf of the American Bar, I would like to say that we would like to look into that, too. The fairness where the lawyer gets more fee the more time his client gets strikes me as being a little unusual.

Mr. RADER. But you say that 29 States offer more than the current Federal limits.

Mr. FOLTZ. That's correct.

Mr. RADER. And I presume, then, that the remainder would offer the same or less.

Mr. FOLTZ. They are either at that level or below. The $20-$30 seems to be a benchmark, which is why—it seems to be kind of a gravitating point. And I think what is most amazingly is that there is a wide differentiation in State maximums, too. Certain States provide for excess compensation in serious capital cases, in murder cases, in certain kinds of murder cases—and there is tremendous variation within some States as well, so that the type of flexibility approach we are already talking about in H.R. 4307 has in fact been somewhat implemented in the States with their schemes; they approach it with a flexible approach.

Mr. RADER. How many attorneys would you estimate nationwide earn some part of their income by defending criminal suspects on court appointments?

Mr. FOLTZ. It's hard for me to really estimate, but the best figure I could probably estimate—if you take a look at the last figure I have, which is 22,000 private appointments, and assume that the great majority of those are not repeat appointments—assuming that, you are probably talking somewhere in the neighborhood of maybe 18,000 or 17,000 attorneys who have at least one or two CJA cases a year.

I suspect that the judges dole them out rather sparingly because they are such a burden, and they rely upon the expertise of the bar. It strikes me as the unusual situation where you have a really experienced CJA bar that is willing to go to the wall time and time again.

It is very difficult to refuse that request, however, if you are working with a trial bench which is relatively small in number. I mean, quite frankly, you do not want to invoke the ire of the judge on some other case; you don't want him or her sitting up there saying, yes, I would love to rule favorably on your motion in the civil case that you have before me, but I do remember that you turned me down on the request to serve on a criminal case.

So you really have to do it, because (a) you want to and you think the Constitution is important, and (b) because you know that there is some kind of a subtle interchange that goes on there.

Mr. RADER. Thank you. Can you estimate, Mr. Shepherd, how many attorneys earn some part of their income receiving court-awarded attorney fees under the fee-shifting statutes? Do you have any way of estimating that?

Mr. SHEPHERD. Well, I must say that unfortunately I have no clear information that might be of help on that, except I would say that our most current figures are that there are 70,000 lawyers now engaged in some form of pro bono activity, organized pro bono.

Now, we know the figure would be much higher if you included those lawyers who are not doing it through an organized bar effort. So if we take that figure, we might be able to make some estimate as to how many lawyers are willing to take on civil rights or whatever action there is. If there are that many who do it for no fee at all, those and other types of pro bono cases, one would suspect that there are available more if the case were right and fees were being paid at least to some that would compensate for overhead and office expenses.

But I will try to get a figure for you, if you would like for me to.

Mr. RADER. Thank you. Congress, as you know, has provided a $75 an hour cap, as brought under the Equal Access to Justice Act. To your knowledge, has this operated to attract competent counsel in most cases?

Mr. SHEPHERD. Well, again, I hesitate to guess at it, but I think the overwhelming bulk of the lawyers of this country will discharge their responsibilities in a competent, appropriate manner for the benefit not only of their clients, but for society, whether the fee is $75 an hour or $85 an hour, or indeed if they do it for no money at all.

But the reason we are here this morning, and I suspect the reason that Congress is now dealing with this, that society's duty to furnish counsel in a criminal case and make equal access for justice more than just letters carved in stone means that it is a problem for all of the citizens, and not just the problem of the bar.

We are willing to shoulder our part of it, but we don't believe that the citizens expect us to shoulder it all.

Mr. **Rader**. Thank you very much. Do you have anything you would like to add?

Mr. **Foltz**. Nothing at this time, thank you.

Mr. **Rader**. We certainly appreciate your testimony and your efforts before the subcommittee today.

Thank you.

Mr. **Shepherd**. Thank you.

Mr. **Rader**. Our final witness to address S. 2802 will be Mr. Charles Victor McTeer. Mr. McTeer practices law in Greenville, MS. Mr. McTeer is a graduate of Rutgers Law School.

We certainly appreciate, Mr. McTeer, your efforts to interrupt your litigation schedule and present your views here to the subcommittee. We will put your prepared remarks in the record, as with the other witnesses, and allow you to proceed orally.

STATEMENTS OF CHARLES VICTOR McTEER, ATTORNEY, GREENVILLE, MS, ACCOMPANIED BY NAN ARON, ALLIANCE FOR JUSTICE, AND ARMAND DERFNER, ATTORNEY

Mr. **McTeer**. Mr. Rader, thank you very much. I would like to also introduce to you at this time Ms. Nan Aron with the Alliance for Justice, who of course, as you know, has helped me with the preparation of my testimony, and likewise cocounsel, friend, one of my teachers, Mr. Armand Derfner, who years and years ago also spent a great deal of time in Mississippi as a practicing attorney.

Mr. **Rader**. Welcome to the subcommittee, both of you.

Mr. **McTeer**. I would like to share some basic thoughts with you pertaining to the place where I live. Last year in the State of Mississippi more than 17 country redistricting suits were filed primarily because of the fact that counties absolutely refused to engage in redistricting in and of themselves. Likewise last year more than 10 at-large election suits were filed at that point in time because of the fact that the at-large election system used, the municipal government elections, has been abused and has diluted black voting strength.

There are untold numbers of section 5 violations in the State of Mississippi. This very year the Mississippi supreme court districts, public service commission districts, and highway commission districts have been sued under the one-person/one-vote doctrine primarily because of the fact those districts have not been reapportioned since 1915.

The State of Mississippi has recently been sued this year for continuing to maintain a literacy test, by not allowing absentee voters who are illiterate to cast ballots with assistance. The State of Mississippi still maintains single-shot voting—this, too, has been the subject of a lawsuit—which requires that an individual voter must cast a ballot for a person that he does not wish to vote for in order to cast a ballot for a person that he does wish to vote for.

I say this to you as a practicing attorney, who has not just practiced in the State of Mississippi, but over the past 12 years has litigated civil rights actions in Ohio, New York, Georgia, North and South Carolina, California, and Wisconsin. I say this to you because in my view, sir, this particular statutory enactment subjects us to the reality of an end to effective, competent, or excellent litigation in this area on behalf of plaintiffs.

The crucial issue here that I think needs to be looked at is whether or not this particular legislation looks at all at the amount of money paid to defend these suits. It does not further look at the amount of money which is paid to attorneys to delay an end to historic disparities.

Now, I say this to you frankly as a practicing civil rights attorney: there are any number of defendants in this country, particularly in the State of Mississippi who see the attorney's fees issue as a basis for maintaining obdurate and obstinate and disputatious conduct on behalf of many defendants. It is in effect a delaying tactic.

If your concern is in fact the lowering of a public burden, then why do you not demand that there be a lower fee award to defendant counsel. They have carte blanche in these actions. I have defended civil rights actions and have likewise prosecuted them; I am one of the few persons who have testified before you who has had that honor; I am perhaps one of the few persons who has come before you who has not been paid to sit here today. I come before you asking for basic fairness, and understanding the fact that what we would like is to be dealt with by one set of rules.

Consider this factual scenario. Plaintiff sues defendant for violation of his civil and constitutional rights; defendant, a municipality, proceeds then to go out and find the clearly most competent lawyer available to him. I would presume that these officials who have come before you today would not hire someone who has suffered the ravages of rampant mediocrity. We have an excellent attorney brought in, the particular counsel looks over the case, and he sets a fee. He then looks at the complaint, files an answer, he sends a bill. He then files pleadings, takes depositions, sends a bill—gets paid. Files a motion, has conferences with counsel opposite, he sends a bill. Goes to trial, loses the case—he sends a bill. That's the way it works on the defendant's side.

Let's talk about how it works from the plaintiff's side. Plaintiff represents individuals generally in the State of Mississippi who are poor. Let us not forget that in the State of Mississippi the civil rights litigation burden is very often, if not most often, carried by black lawyers, attorneys who are not a part of the old-stream old-boy network, but attorneys who have in great part dedicated their time and effort to the litigation of civil rights causes. They proceed then to meet with groups of people to in turn understand the nature of a problem; they file a complaint; there is no money to be billed out because they have no money they can receive. They then proceed to take depositions. More often than not, sir—and I don't know whether or not you have practiced law in the past—but more often than not we borrow money to do that, if necessary, or we take the money from our own pockets in order to do that. Still there is no payment. We do research on particular causes of action. Consider, for example, the Indianola, MS, case, which is a part of my testimony. The city of Indianola for 16 years—Indianola, MS—failed and refused to attempt to preclear a white area which had been annexed into the city. For 16 years there was no preclearance. The U.S. Department of Justice received notice of this event in 1975, but, having received notice, took absolutely no action whatsoever to stop the illegality. Plaintiff counsel, myself in this instance, filed suit. What was the defense? The defense, sir, was statute of limitations and unconstitutionality of the Voting Rights Act, something which was resolved in the *Katzenbach* case almost 20 years earlier. The case went on in terms of these demonstrable avenues of approach for more than 4 years and remains pending at this time, despite the fact that the courts have already ruled in three cases before a three-judge district court, two cases before the U.S. Supreme Court, two cases before the fifth circuit, that the city's action in failing and refusing to preclear these areas was in fact unconstitutional and violative of section 5.

Considering these different and varying decisions made in this case, still the plaintiffs in this case, unlike defense counsel, have not been paid. The plaintiffs in this instance do what is only logical, they file a motion and a bill for attorney's fees.

The argument from the other side is: These people are asking for too much money. In fact, we asked for $140 per hour, which we thought was a reasonable rate, coming to a total amount of $100—excuse me, sir, I made a mistake on that—we asked for a base rate approximately an average $85 an hour, coming to a total amount of $140,000 for approximately 2½ years of litigation solely on one case.

The defendants screamed and hollered, claiming that this amount was unreasonable, horrid, one of the worst abuses ever seen in the history of litigation. It was only later that we learned from the press sources in this town that the defendants for the attorneys same period had been paid $170,000 for their representation.

We only ask that we be treated by one set of rules.

I don't know if you are a New York Yankee fan, but I am, and I think that it is only fair that if I am——

Mr. RADER. I thought everybody was for the Cubs these days.

Mr. MCTEER. Well, we call Chicago north Mississippi, but, frankly, I'm still a Yankee fan. I say that if I stand at the plate and if the pitch is being thrown, then the fences should not be moved back. When defense counsel stands at the plate, the fence is at 310 down right field, 310 down left field, 410 dead center.

Now, right now, the way the situation rests, right now, when I stand up to the plate, the fences down left field go to 480, dead ahead it goes to 680, down right field 480.

If you put this piece of legislation in action, then we might as well start playing football, because the field is going to move out about 1,000 yards.

Let me explain the reason why. Have you ever had to file an attorney's fee motion?

Mr. RADER. Myself?

Mr. MCTEER. Yourself.

Mr. RADER. The chairman of the subcommittee has litigated extensively as a practicing attorney prior to his Senate service.

Mr. MCTEER. Have you ever seen anybody here testify that they had one other than me?

Mr. RADER. They did not testify to that.

Mr. MCTEER. I know. Let's talk about why they didn't talk about it

You see, when you file an attorney's fee motion, you don't get what you ask for, when it's reasonable. You see, the first thing the court does is it has to make an assessment of the reasonability of your proposed hours, so they make an inquiry of that reasonability. Let's say on June 12, 1984, you listed that you made a phone call to Armand Derfner. One of the questions the court will ask you is why. And they go through a list of everything you do with that kind of specificity. And defendants attorney, even though their client doesn't know why simply file their motions correspondence, pleadings and their bills on a regular basis, they just write on their bill "Telephone conference, Armand Derfner"—that's it.

But when plaintiffs file their motion, the court makes an inquiry as to why that's happened. The contingency factor. You say, for example, the contingency is irrelevant. Let me suggest to you, sir, that there is not a single person here who testified that had to put their life, their family, their food, their mortgage on the line in order to litigate for someone's constitutional rights. I have done that. I have experienced it, and I am proud of it.

The point of the matter, sir, is that the time of waiting 4 years to get paid for a case that you have spent 90 percent of your time on does not make your banker a healthy or happy person. The bottom line is, sir, that there is a need to understand that the reason why, for example, multi- pliers may be sufficient and important to understand is because lawyers can literally go broke attempting to litigate on behalf of poor and illiterate people.

If you bring an issue in a case, which you may not win on—let's say, for example, that you have a case that raises an issue under section 5 of the Voting Rights Act and likewise under section 2 of the Voting Rights Act, and you want to get to the section 5 issue quickly because, you know, you can get in and out very fast. Let's say that you do that and you are successful, so you go for attorney's fees. Now, the defendants come back and they argue, well, you are only entitled to attorney's fees for one half of what you did—why? Because you lost under the section 2 issue. But we never litigated the section 2 issue. But you had it in your complaint, Mr. McTeer.

The bottom line, sir, is if I hadn't put the section 2 issue in the complaint, my clients could come back and charge me with having made a crucial mistake, even though I won on the issue I pursued.

Isn't it apparent to you that despite all this talk of limiting fees and all of the talk on the basis of this particular legislation, the only thing that you will resolve is avoiding a fair market rate for a particular attorney's services, and only for the plaintiff attorney.

Defense attorneys get fair market rates, and it's absolutely clear that despite what Ms. Dinkins has said—Ms. Dinkins own law firm, in her firm, in 1980 she made $131,000—in her own law firm people are making $200 an hour. It is also clear that 43 States within the States said that they should in fact be able to apply the appropriate market value for hiring and employing an attorney. Why is it that civil rights plaintiffs should be the only group, the only persons, that again should suffer the ravages, as I put it, of rampant mediocrity?

I would like to suggest to you that prolonged litigation of 4 or 5 years is common; I would like to suggest to you that people putting their lives and futures on the line in order to protect constitutional rights is common. But what, sir, may not be common to you is the knowledge that this particular administration, as I have indicated to you earlier, has not done much of anything in order to protect constitutional rights.

The crucial issue here is not whether or not a person should be paid a huge amount of money in order to litigate; the question here is, in view of the Federal Government's failure to attempt to protect constitutional rights within the State of Mississippi—you may recall the litany of cases that I started this case here with—the point of the matter is, sir, those were all brought by private attorneys, and the Attorney General of the United States was informed of these cases and failed and refused to take any action on their behalf.

The question is whether or not private attorneys general will be allowed to continue to engage in efforts to protect constitutional rights. There cannot be two standards; there cannot be a standard for defense counsel and a standard for mediocre plaintiff counsel. It will reduce the ability of people to actually effectively have constitutional and other rights protected.

Who in their right mind would litigate as a plaintiff counsel in an area where he knows, built into the system, his cocounsel will in fact make tremendously more money than he will?

Did you know that there are professional civil rights defense counsel? And many defense counsel, that's all they do. I can go out and file a complaint and call up a certain firm in Jackson and say, hey, man, I am about to make you some money. We understand that, and you are going to say that they can play by the $100-an-hour rule but we have to play by the $75-an-hour rule.

You know, I don't understand the fairness of a situation where I put up my own money, put up my own time, borrow money to win a case, beat the hell out of the other side, and they make more money than I do. It's not fair, it's not appropriate.

And the ultimate result will be that many young lawyers, be they black or white, simply will not engage themselves in the effort.

Let me tell you something about "multipliers." You see, defense counsel knows that in a contingency case against an under-financed counsel, that he can paper him to death; it goes on all the time, it goes on in insurance litigation, it goes on in all formats. But it is a particularly heinous format in civil rights litigation, because of the rights at stake.

Now, defense counsel very often will paper one to death. And, sir, I think it was one of the attorneys who were seated here, the attorney general said, he pointed out the fact that you have got to go pretty far, your conduct has to be outrageous before the court will call you short. The law has particular statutes to protect litigants from that action—it's called 28 U.S.C. 1927, and basically that statute says that if someone files a pleading in order to basically delay the pleadings in any way, shape, or form, then that particular attorney and the client may be assessed with fees.

We have filed motion after motion after motion to stop defendants from papering us to death. They paper us on motions to compel discovery, motions for protective orders, motions to stop us from engaging in basic discovery, thereby lengthening the process, knowing full well that every bit of time, every bit of energy that we spend to defend that particular issue is money that comes out of our pockets, while, like the members of the group that came before me here, the attorneys general, they are paid under the State aegis or else they send a bill.

Courts consistently refuse to award fees under those circumstances and say let's wait till the end of the case and we can work it out at that point in time.

I would suggest to you that multipliers may be appropriate, certainly in situations where the conduct of the defense is clearly obdurate, obstinate, disputatious, and clearly oriented toward an effort to delay conclusion of the litigation itself.

But also, sir, if nothing else, I hope that my testimony here today has impressed upon you the absolute difficulties which are permanently felt by attorneys, both private and public, who engage in civil rights litigation on behalf of plaintiffs. We represent the little guy.

I want you to think about this. That $170,000 I made mention of in the city of Indianola, did you ever stop to think that not only have the blacks in this particular community been subject to discrimination, but that they are paying for it since the county and the city paid the attorneys tax payers money for the defense, for continuing in litigation which has already been declared to be improper and unconstitutional, and defending those actions?

I suggest to you, sir, that playing by one set of rules—that is a fair market rate—is exactly what the defendants want, it's exactly what we want.

You may recall that in my testimony I proffered to you a proposed amendment, and what it basically said—and I would like to read, if you don't mind, the following—we would like for you to add subsection (g) to this legislation, and I would like to ask Mr. Clark and the gentleman from Utah and the other gentleman whether or not they would agree to this language; I would ask Ms. Dinkins if she would agree to this language. It reads as follows:

> (g) The provisions of this Act shall not apply unless the governmental entity against which fees and related expenses are to be assessed files with the agency or court which is to make the fee determination, at the time of its original pleading, certification that it has not, since the effective date of this Act:
>
> (1) paid or agreed to pay any attorney more than $75 an hour;
>
> (2) paid or agreed to pay any attorney, in a litigated or settled matter, a fee which is not contingent upon success in that matter,
>
> (3) paid or agreed to pay any attorney prior to entry of a decision on the merits by the court or entry by an administrative officer of a final decision of an administrative proceeding.

I defy you to ask any of these people if they will support this amendment. Why? It puts defendants in the same ball game with plaintiffs.

If you do that, my goodness, I can hardly wait; there won't be a defendant's counsel in the entire United States if they are made to play by the same set of rules that we play by.

The issue is whether or not we are entitled to fair and reasonable market values. The issue is not ending any long and ongoing dispute; the dispute will continue even with your legislation. The dispute pertaining to whether or not hours are proper, redundant, whether or not in fact they should be continued or changed will not end. The only question will remain as to whether or not fair market value is appropriately being applied.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF CHARLES VICTOR MCTEER

Mr. Chairman and Members of the Subcommittee, I am Victor McTeer, from Greenville, Mississippi. I am a 1972 graduate of Rutgers Law School, and have been practicing civil rights law in Mississippi for more than a decade. I now specialize in voting rights cases.

I appreciate the opportunity to be here today to testify against an anti-civil rights bill, S. 2802. This legislation threatens my ability to represent my clients, most of whom are civil rights plaintiffs in Mississippi and elsewhere throughout the South. More importantly, however, it threatens my clients' ability to go to court to try and enforce the civil rights laws of this nation. Under this Administration, my clients and other people like them are the only ones who are trying to enforce this nation's civil rights laws. Where this country's civil rights laws are not enforced, my clients are not the only ones who suffer. The whole nation suffers.

The vast majority of the federal statutes which will be governed by this bill are civil rights, consumer protection, environmental, and sunshine and privacy laws. I know consumer and environmental groups aren't very happy about this bill either, because it threatens their access to courts in the same way it threatens my clients' access. But the impetus for this bill appears to be awards of fees against state and local governments in civil rights cases, and, because I practice civil rights law, my comments will focus on those cases. Also, because I am a civil rights specialist and not an attorneys' fee specialist, I am not treating the technicalities of the proposed legislation. I will concentrate instead on what this legislation means, in real as opposed to technical terms, for a civil rights practitioner in Mississippi and other Southern states. I understand that several people are planning to submit statements for the record. I hope that you will give them an adequate opportunity to supplement the record, so that I can leave the technical analysis to the Washington lawyers, and allow the consumer and environmental groups to speak for themselves, if my testimony doesn't address all of their concerns.

I'm afraid the sponsors of this legislation have heard only one side of the story, or they wouldn't be proposing it. The groups which have sought passage of some type of fee limiting legislation over the past several years -- state and local and federal governments -- are large and strong. And they are fervent, as well. Today, we have three State Attorneys General and a senior Justice Department official testifying on behalf of this bill. But there are real people out there with another side of the story. They're just not as well financed. I'm here today to give you their side of the story.

While the bureaucrats you have heard label this legislation a bill to establish standards, in light of what they say are excessive attorney fees which have been assessed against state and local governments in civil rights litigation, the real people whom you have not heard — my clients and others like them — view this as legislation which is aimed at making it cheaper for federal, state and local governments to violate this nation's fundamental civil rights laws, and which may let them get away with those violations scot free. They do not support this aim, or this legislation. Neither do I, and neither should you.

The bureaucrats whom you have heard complain, simply and without any statistics to back them up, that these measures are costing them too much money.1/ The reason these measures are costing them too much money -- if indeed they are — is that they are breaking the law. The fee-shifting measures affected by this legislation were designed to help make civil rights laws self-enforcing, by encouraging victims to sue, by attracting competent counsel to help them, and by increasing the cost of

---

Footnotes end of statement

violating these laws. To minorities, complaints that these measures cost too much indicate that they may just be beginning to work, not that some sort of drastic overhaul is needed. For minorities, the simple answer to the bureaucrats' complaints is that the government should stop breaking the law, and avoid the expense altogether. The bureaucrats' answer is different: it costs too much to violate the civil rights laws, so you should make it cheaper.

In the "Findings and Purposes" section of this bill, whatever bureaucrat drafted it says that Congress' failure to provide standards for fee awards has led to excessive fees, and that it is unfair for Congress to impose fees on state and local governments without establishing such standards. This legislation has nothing to do with setting standards for existing fee legislation. The main target of those you have heard has been the Civil Rights Attorney's Fees Awards Act of 1976. The legislative history of that Act, which has been applied under the other affected laws, is, as the Supreme Court has recognized,2/ very, very clear: it speaks in terms of fees calculated along the same lines as antitrust cases.3/ This proposed legislation does not really set standards; rather it changes the ones initially set out in the 1976 Act, by reducing the market rate approach set out there to a limit of $75 per hour. That is the only clear standard contained in this bill. Then it includes a variety of other "standards," all of them aimed at reducing a fee below that limit. Where courts now have the flexibility to increase or decrease a fee in a case, in the exercise of their discretion, this fee proposal removes that flexibility only when it comes to raising a fee.

If Congress feels that it must set "standards" for fee statutes in order to avoid "inconsistent interpretations of these Federal civil fee-shifting statutes" -- another purported reason for this bill -- then how could Congress specify that fees can't be recovered for work that is "excessive, redundant, or otherwise unnecessary"? What type of a "standard" is that? And what about a "standard" that says you can't get paid for legal services which were "excessive with regard to the nature of the controversy," or you can't get an amount which "unreasonably exceeds the monetary result or injunctive relief achieved"? We still have some judges in Mississippi who might feel that any relief in a race case wasn't worth a plug nickel. What type of "standard" is that? This bill doesn't set definable "standards" at all, with the exception of the $75 an hour cap. And that isn't setting a standard, but changing one.

In the name of consistency, this legislation robs the courts of their current ability to increase a fee to make it more reasonable, while including in statutory language just about all the factors the courts are now using to decrease a fee. In the name of the setting of standards, this bill merely casts off the existing standards which the bureaucrats do not like, and adopts verbatim the standards which they do.

Just as this bill -- this "legal equity" bill -- has nothing to do with setting standards, it has nothing to do with equity either. For example, it sets an inflexible maximum for what a a government must pay when it breaks the law, but sets no such maximum on the court awarded fees that same government may receive when it wins.[4] This bill also lets a court award far more to an attorney who attacks discrimination by a private citizen than by a government. Why should it be harder to enforce the law against against state, local or federal lawbreakers, who are breaking not only the law but a public trust when they discriminate? As if that weren't anomaly enough, it allows businesses and taxpayers who prevail against the federal government to recover more than $75 an hour, but limits the civil rights plaintiff to $75 an hour. It permits a government contractor who recovers damages from the federal government to be made whole by retaining his entire damage award and recovering his fees, but requires a government employee fired because of his race to give up part of his back pay in exchange for having his lawyer's fees paid. Why should businesses be preferred over blacks or other minority citizens that the government has discriminated against? This type of legislation tells me and my clients that this nation is trying to break the promises that you have made to us. It [illegible] and angers all of us who were told that this nation's commitment to civil rights was a strong as its commitment to economic wealth.

One of the worst inequities is that this bill doesn't set any limits on what a governmental entity itself can pay to the lawyers it hires to defend civil rights cases. This means that a city or state can come up to Washington and hire some national expert, who charges upwards of $250 an hour for his time,[5/] secure in the knowledge that the civil rights plaintiff will be limited to $75 an hour. Expertise aside, that $250 an hour is going to buy the government the support services and backup of a large Washington firm -- services which local counsel are hard pressed to provide, particularly at $75 per hour. That $250 lawyer can quickly overwhelm a civil rights practitioner.

I don't know how many of the members of this subcommittee have ever prosecuted a civil rights case. It's pretty easy to talk about, and to analyze, and to pose questions about how it could be done better or more cheaply, but out there in the real world it's not easy. Taking on City Hall has always been difficult at best. Speaking from experience, I know that City Hall will frequently use superior resources in litigation to wear the civil rights plaintiff out before the end of the case. The defendants will litigate every point, raise every specious argument imaginable, and pay their own lawyers all outdoors, in hopes that underfunded civil rights plaintiffs will simply have to give up.[6/] Fee legislation has helped alleviate this situation a little. This bill, which sets the fiscal disparity in stone, reinstates it with a vengeance.[7/] No wonder the governments want to see this bill passed!

While what upsets me most about this bill is its effect on my clients' access to the courts, and its effect on their ability really to prosecute a case once they get there, I'm also upset by the fact that this bill brands me a $75 an hour lawyer because I have opted to specialize in civil rights. The 1976 Act and others like it, after all, were passed to attract folks like me, and folks like that $250 lawyer, to civil rights cases. Let's take a look at it, though. When the government hires that $250 lawyer, he gets paid for all the time he spends, because the court isn't looking at his timesheets and saying his time was excessive, or redundant, or unnecessary, or out of line with the importance of the government's goals. That $250 lawyer gets paid for all his time even if he loses the case, and he gets paid as the case goes along, every month. He has no trouble paying the rent and paying his staff when the bills fall due. That $250 lawyer is in a pretty secure position. I know how good that feels, because I once represented the City of Greenville, Mississippi, in a civil rights case. While this was ten years ago, and I wasn't getting any $250 an hour, I was getting paid whether I won or lost that case. I was getting paid more than I'd ever been paid before, and for all the time I put in. I was getting paid, and paying my bills, before the case was over.[8/] And I had all the resources and staff of the City of Greenville at my beck and call. Despite what the governments are telling you Senators about excessive fees, and bilking or gouging the taxpayers, that feeling of financial security is one I haven't had since I represented one of those governments. The difference between that one case and all of my civil rights work now, in which I have to depend upon court awarded fees, is the difference between day and night. And yet you are proposing to make it worse for me.

What happens, under this bill, to the $75 an hour lawyer who is prosecuting the civil rights case? What happens to me when I'm not representing a city? Let's take a not atypical hypothetical. I bring a voting rights case against a city in Mississippi, and manage to have the City Council reapportioned. For the first time in recent memory, the council will be elected in a constitutional manner. Under this bill, I submit a petition for $75 an hour for the time I have put in. I have a court breathing down my neck, telling me in hindsight that I spent too much time in light of "minimal" results, because the court did not accept all of my contentions. Because the court failed to move three of seven district lines, it reduces my time by three-sevenths to reflect lack of success on particular issues. The court also deducts the time I spent on constitutional issues which it didn't decide because the case was decided on statutory grounds. Under this bill, these are not issues on which I have prevailed. The same high-priced lawyers who billed the taxpayer for all the time they spent, telling the court how weak my case was, now try to cut my fee by telling the court that my winning the case was no great shakes because it was such a sure winner from the beginning. In the end, I recover for one-half of the hours I put in. This is the type of thing that happens to civil rights lawyers now, even without this bill. Under this bill, though, this scenario reduces an already unreasonable $75 an hour to $37.50 an hour. I didn't spend four years in college, three years in law school, and more than a decade establishing expertise in civil rights law, to recover a small fraction of the hourly rate paid by my losing municipal opponents.[9] I'd be better off under this bill accepting appointments under the Criminal Justice Act, where fees are recognized as being not even compensatory.[10] And yet this bill is being touted as one to bring "equity" to fee provisions which were intended to provide an incentive to the bringing of civil rights suits.

I don't think that the lawyer members of this subcommittee could look me in the eye and tell me that they would make a practice of representing civil rights claimants for a contingent fee of $75.00 per hour, or $37.50 per hour, paid only at the conclusion of the case, when they could get a guaranteed hourly rate, paid on an as-you-go basis, of $150 or $250 an hour for representing the defendant. I cannot believe that the members of this subcommittee seriously think that that $75 an hour is going to attract the $250 an hour lawyer, or any other lawyer for that matter, to prosecute a civil rights case, particularly where the court is going to pay him for only part of the time he spends, and he's risking getting no payment at all if he loses.

I realize that the Department of Justice says it limits the fees it pays outside counsel to $75 per hour already, but those people get paid whether they win or lose a case, and they get paid for all the time they put in. Other federal agencies pay considerably more, in cases where the fees are paid no matter what the results of the case.[11/] States and municipalities also pay far more to their outside counsel, for guaranteed payment work.[12/] If this subcommittee is interested in something which can truly be called a "Legal Fees Equity Act," it will amend this bill to limit its application to governments which agree to pay their own outside counsel no more than $75 per hour, payable at the end of the case, payable only in successful litigation, and payable only after the federal court has gone over the bills to make sure that the outside attorney didn't spend excessive or redundant time. The same taxpayers that pay my fee are paying his. My clients, who are also taxpayers, believe that the money which goes to me when I force their government to stop discriminating against them is better spent than the vast sums the government spends in efforts to keep on discriminating. Any bill which calls itself an equity bill will take their concerns at least as seriously as those of the discriminating governments. I am attaching to my statement a proposed amendment which incorporates this idea. I hope that the Subcommittee gives this proposal serious consideration.

If concern for the taxpaying public is what prompts this legislation, there are ways to deal with the problem forthrightly and more effectively, instead of just singling out civil rights as the area where the concern is stated and perceived problems "rectified." The concept of the 1976 Act, and other measures like it, was both a revolutionary and a sensible one: rather than set up one more elaborate federal bureaucratic agency to make sure that civil rights laws are enforced, why not bring it closer to home, and let citizen watchdogs, or "private attorneys general," do the work of enforcing those fundamental laws? And who should pay the cost of that enforcement? The violators, rather than the violatees. I can't think of much legislation that has come from Washington in recent years which has made more sense than that. Congress recognized that, in order to make the system work, fees would have to be large enough to attract adequate and competent counsel; that is, fees would have to be competitive enough so that financial concerns would not lead lawyers to forego civil rights cases. Congress therefore specified that market rates -- such as the rates received in antitrust cases -- would apply. Economics would no longer dictate who would, or could, prosecute civil rights cases. As a result, the fees awarded in civil rights cases should be merely a reflection of the fees that exist in the marketplace. Rather than focus on market rates in civil rights cases, then, why not concentrate on the rates set in the marketplace? Why does Congress want to concentrate on the so-called burden placed on taxpayers by fees assessed in civil rights litigation, rather than on the far larger burden of fees taxpayers pay their government's outside counsel, in both civil rights cases and other matters?[13]

This may seem simplistic, but it makes sense to me. One of the main reasons that marketplace rates are so high is that they are set mainly by attorneys who hire themselves out to corporations. One of the main reasons that corporations are willing to pay such high fees is that these fees are tax deductible.[14] It is my view that Congress is being shortsighted and unfair by focusing on civil rights cases. Congress should instead remove the tax deductibility of corporate legal fees. I am convinced that this would lower market rates, because the corporations which now pay those high rates would be unwilling to do so if fees could not be deducted. If market rates go down, civil rights rates pegged to market rates go down as well.[15] At the same time, it would make it easier for middle class consumers to hire a lawyer. It would help taxpayers far more than this bill does, by increasing federal tax revenues and reducing the fees that governmental entities pay their outside counsel, both in civil rights cases and other areas. Finally, it would accomplish all this without making minority citizens feel that this country no longer wants to see civil rights laws enforced.

I'm a civil rights lawyer. In deciding to become a civil rights lawyer, I knew that I would not make the fortune that other lawyers make. I looked upon the 1976 Act, and others like it, as a way to keep body and soul together while I got on with my work. This it has enabled me to do. Other civil rights practitioners have not been so fortunate.[16] I'm not greedy. I don't have to make what a Wall Street lawyer makes. Contentions that, because of civil rights fee-shifting provisions, I _do_ make that kind of money, make me angry. I'm usually not awarded market rates. When I am awarded market rates (which are admittedly smaller in Mississippi than on Wall Street), I'm awarded those rates typically for far fewer hours than I have actually spent, because the court, not the client, decides how many hours were reasonable. That _always_ means that I'm making less than market rates for my time. Even if the court awards me what the defendant is paying its lawyers, I'm making less per hour than they are. Reducing market rates to an inflexible $75 per hour under these circumstances is an outrage.

I note that the federal government's witness today, Ms. Dinkins, received $131,454.00, in 1980, from the private practice of law[17] -- Lord only knows what she made last year in private practice -- and yet she is telling me that my efforts on behalf of civil rights plaintiffs are worth a small fraction of that. Her firm in Houston charges $200 an hour for its senior partners,[18] whether those partners win or lose their cases, and yet she is telling me that my time should be billed at $75 an hour (about what her firm charges for their greenest associates), which the court can reduce even further, and which I get only if I win the case. I happen to believe that Congress should be focusing on her $200 an hour, or the $250 an hour Fort Lauderdale was paying its voting rights defense lawyer, or the $190 an hour lawyers who were admitted to the bar about the same time I was charge in bankruptcy cases.[19] That's where the problems lie, not with me.

I thank the subcommittee for its attention. I realize that some of the things I have said here today may strike you as blunt, and perhaps even offensive. But only one of this bill's many opponents was permitted to testify here today, and there are some pretty heavy hitters on the other side. I felt I couldn't serve the interests of the constituency which you have not heard without raising my voice. That constituency -- people like my clients -- views the Civil Rights Attorney's Fees Awards Act of 1976 as a Legal Equity Act. Its promise of full enforcement of the fundamental civil rights laws has not yet been fulfilled, and it never will be if this Legal Inequity Act is passed. Fair is fair, and this bill is not fair.

Thank you.

FOOTNOTES

1/ For instance, the executive director of the National Association of Attorneys General, three of whose members are testifying here today, is reported as complaining that civil rights attorneys fee awards "smell of rip-off." He continued: "A handful of voracious lawyers is using every trick in the book to inflate their fees to the highest possible level, with little regard for the consequences beyond lining their own pockets." New York Times, December 18, 1983, p. 8-E. Of course the truth is that he has it backwards. For example, the auditor of the State of California issued a report in December of 1983 revealing that the State of California, in 1982, paid $3.57 million in legal fees to its own outside counsel, at rates ranging up to $275 an hour. In that same year, California paid out only $34,437 in attorney fees to prevailing plaintiffs, at rates of up to $80 an hour (less than one-third the highest rate paid the stat's outside counsel). Interestingly enough, California's taxpayers actually benefitted from fee-shifting provisions that year, because the State itself recovered $47,720 in court awarded attorney fees -- more than it paid out.

2/ See Blum v. Stenson, 104 S. Ct. 1541 (1984).

3/ S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

4/ In a recent case, for example, the federal government sought and recovered fees of $90 and $110 an hour in the United States Court of Appeals for the District of Columbia. Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Commission, Secretary of Labor, No. 83-2046. Court of Appeals Judge Wald, although agreeing with the judgment of the court, issued a separate statement:

> "Although I approve the granting of the attorneys' fees requested by the government in this case, I find it singularly ironic that the same government has consistently opposed attorneys' fees of more than $75 an hour, regardless of experience or other circumstances, for private attorneys and has proposed legislation to put a $75 cap on all such fees. Despite a temptation to invoke the maxim that government, like an individual, should be prepared to abide by the standards it advocates for others, I vote to grant the government attorneys' application for prevailing market rates here in the interests of judicial consistency."

Id. (citation omitted).

And the federal government is not the only governmental entity to which Judge Wald's statement applies. State governments routinely seek, and recover, market rate fees in excess of $75 an hour. See, e.g., State of Arizona v. Maricopa County Medical Society, 578 F. Supp. 1262 (D. Ariz. 1984)(fees of up to $140 per hour, plus multiplier of 1.4, for effective hourly rates of up to $196); In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983) (market rates of up to $90 per hour, plus multiplier of 1.5, for effective hourly rates of up to $135); In re Cement and Concrete Antitrust Litigation, 1980-81 CCH Trade Cas. ¶ 63,797 (D. Ariz. 1980)(market rate of up to $125 per hour, plus multplier of 2.85, for effective hourly rates of up to $356.25). In fact, 43 states signed an amicus curiae brief in the antitrust case of State of Illinois v. Sangamo Construction Co., 657 F.2d 885 (7th Cir. 1981), arguing that market rate fees and multipliers were appropriate for attorneys employed by the state.

5/ *See Fort Lauderdale Sun-Sentinel*, Friday, June 24, 1982, pages B1 and B2, explaining that the City of Fort Lauderdale had hired the Washington lawfirm of Rhyne & Rhyne to defend a voting rights lawsuit, and was billed $90,468 for less than three months' work, including "$750 for three hours spent thinking about a request for the federal judge to dismiss the lawsuit . . .." According to Fort Lauderdale's City Attorney, the reason the City hired the firm was that "they had a track record." This same firm was also hired by the City of Mobile, Alabama, to defend a voting rights case, and billed its most recent time at the following average hourly rates (including both associate and partner time); August 1979, $133.01; September 1979, $147.22; October 1979, $140.00; November 1979, $135.58; June 1980, $115.38, or an average rate overall of $134.24, with payment guaranteed and received monthly.

6/ In the case of Ruiz v. Estelle, 553 F. Supp. 567 (S.D. Tex. 1982), for example, the state of Texas used the services of 56 lawyers, 46 paralegals, and numerous legal assistants. Twenty-four of the lawyers were salaried employees of the Texas Attorney General, and a conservative estimate of the amount of time these lawyers spent *per year* on the litigation was 6,000 hours. At the same time, the outside lawyers which Texas retained (at 1980 hourly rates of from $75 to $110 for associates and $125 to $165 for partners) spent 6,268.5 hours in a seven-month period on the litigation. That means that the State of Texas paid for nearly ten thousand hours of legal services in a seven-month period. When, however, the plaintiffs claimed fees for a total of fewer than 7,500 hours, expended over a period of eight years, not seven months, the State resisted the application on grounds that the time claims were excessive and unreasonable! Here, too, the plaintiffs' claims for expenses for a total of ten years were less than the expenses charged for seven months by the State's retained counsel, and those outside counsel had the resources and facilities of the State government behind them as well.

The State of South Carolina spent an estimated "absolute minimum" of $500,000 over a six-month period to its five retained counsel in litigation *which it itself filed* over reapportionment of its state senate. When a Republican Senator sought to require the State to negotiate with the Justice Department rather than continue litigating, after a court memorandum made clear that the lawsuit was a sure loser, his effort failed. *The Columbia State*, Thursday, May 3, 1984, pp. 1-A, 7-A.

The County of Sumter, South Carolina, paid $150,000 to outside counsel in a seven-month period, for litigation *which it itself filed* over its method of elections. Over a six-year period, that County spent more than $406,000 in fees to its outside counsel in this voting rights litigation, all parts of which the county lost. More than $350,000 of that money went to the same firm which was paid at least $500,000 from the state for the unsuccessful senate reapportionment case.

The State of South Carolina also paid that same firm $231,459.60, plus more than $35,000 in expenses, for representation in litigation involving the firing of two football coaches and one basketball coach. The state lost all three of those cases. The total amount of fees which the State paid the plaintiffs in those cases was $7,000. *The Columbia State*, Wednesday, August 29, 1984, pp. 1-C, 11-C.

The City of Indianola, Mississippi, paid $10,000 to a Washington lawyer just for preparing a Section 5 submission letter to the Justice Department. The City of Fort Lauderdale spent $90,468 of its taxpayers' money for less than three months' work in a voting case, which that city ultimately lost. *See* note 5, *supra*. The list goes on and on. Closer to your home, I note that Prince Georges County, Maryland, paid $3 million in legal fees to outside counsel from Washington, New York, and Baltimore, over a three-year period. *The Washington Post*, Friday, November 4, 1983.

7/ When Congress passed the Civil Rights Attorney's Fees Awards Act in 1976, it recognized that a large number of defendants in cases where that Act would apply would be governmental bodies and, ultimately, taxpayers. But it also recognized that these governmental bodies have greater resources than civil rights plaintiffs, and specified: "Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976)(footnote omitted).

8/ Civil rights practitioners frequently find it necessary to borrow money to finance their practices until cases are over and the fees received. The "market rate" fees about which the governments are complaining must therefore cover the interest which we must pay on those loans — interest which those counsel who are paid market rates by the governments every month do not have to incur. This most assuredly reduces the value of those market rate fees. Governmental defendants will frequently delay the case, or delay payment of the fee, recognizing that the poorer we become, the stronger their position. One court, recognizing this problem in a case where the governmental defendant delayed paying a court awarded fee for an unconscionable length of time, ordered the defendant to pay not only post-judgment interest on the fee award, but the interest on plaintiffs' counsels' operational loans during the pendency of the suit as well, as a precondition for the court's willingness not to hold the defendant in contempt of court. Association for Retarded Citizens v. Olson, 561 F. Supp. 495 (D.S.D. 1982), *aff'd in rel. part*, 713 F.2d 1384 (8th Cir. 1982).

9/ One Mississippi municipality — a defendant in a suit quite similar to our hypothetical — paid its Washington lawyer $10,000 for writing a Section 5 submission letter to the United States Attorney General. This worked out to approximately $150 an hour for *writing a letter* based on information supplied by the City.

10/ I am certainly in favor of the long overdue upward revisions of the Criminal Justice Act scale which this bill contains. Under those revisions, though, the appointed lawyer recovers $40 an hour for his out-of-court time, whether he wins or loses the case. If I recover for only half my time, or if I have to spread my fees over some cases which I lose, I'm making less money arguing a successful constitutional issue before the Supreme Court than he makes studying the file.

The CJA proposal here also points out another problem with this bill. The CJA rates haven't been increased for fourteen years. That kind of thing happens when you put a sum certain into a statute. I wonder what a rate of $75 per hour is going to look like to even a graduating law student in the year 1998, particularly when there's a lawfirm in California that, *in 1983*, charged up to $70 an hour *for paralegals*? *The American Lawyer*, September 1983, p. 1. This article also states that a Dallas lawfirm charges $125 an hour for a law clerk not yet admitted to the bar. *Id*. at p. 10.

11/ Freedom of Information Act requests from federal agencies other than the Department of Justice have revealed that, for example, the United States Postal Service retained Vedder, Price, Kaufman, Kramholz and Day to represent them in Fair Labor Standards Act litigation at hourly rates of up to $175 for partners and $100 for associates. That agency also hired Califano, Ross and Heineman at hourly rates of $150 for Mr. Califano, up to $125 for other partners, and up to $100 for associates. Similarly, the Postal Service has agreed to pay Gibson, Dunn and Crutcher up to $175 an hour for partners and $100 for associates in connection with collective bargaining negotiations. The Pension Benefit Guaranty Corporation pays up to $175 an hour for partners, as does the Federal Home Loan Bank Board. The Federal Aviation Administration pays up to $150 for partners, while the Federal Reserve System pays up to $145 for partners. According to the Federal Times of October 10, 1983, Mr. Califano has received approximately $1 million in fees from the U.S. Postal Service Board of Governors. According to a May 28, 1984, article in the Legal Times, the FDIC paid outside counsel $17.7 million in 1983 alone, while the Federal Home Loan Bank Board paid $6.4 million to outside counsel in the same year.

12/ See footnotes 1, 5 and 6, supra.

13/ See note 1, supra.

14/ Although the bureaucrats argue that antitrust rates should not apply to civil rights cases because the taxpayer pays the civil rights fee but not the antitrust fee, the taxpayer actually does wind up paying those antitrust fees, through both tax deductions and price increases.

15/ The fact is, of course, that in many cases we still don't get market rates. And even when we do, the effective rate is reduced by the many courts which unreasonably cut our hours. If corrective legislation is needed on civil rights attorneys' fees, this is the problem you need to focus on. For every isolated anecdote which the attorneys general can offer in support of their contentions that civil rights lawyers are doing too well, I can come up with 20 cases which prove just the opposite.

16/ A civil rights lawyer in Tallahassee reports that the only other firm in town which relies in large part on court awarded attorney fees has just been forced to cut its size in half. This lawyer reports that his firm is trying to pay off $40,000 in operational loans. One of the oldest civil rights firms in the nation, which operated out of Tennessee, was forced to disband a couple of years ago. Lawfirms which specialize in civil rights cases are going out of business at an alarming rate.

17/ The National Law Journal, May 11, 1981, p.10. This article makes it clear that other administration officials and former administration officials did equally well, or even better, in the last year of practice prior to joining the government. For instance, Edward Schmults, Ms. Dinkin's predecessor as Deputy Attorney General, realized $285,696 from his commercial law practice, not including the $20,000 he earned as the executor of an estate. William French Smith, the Attorney General, took home $325,000, and the incomes of those Assistant Attorneys General who were in private practice prior to joining the government were all in six figures. Even the Assistant Attorney General for Civil Rights, William Bradford Reynolds, realized $229,278.18 in his last year of private practice.

18/ The American Lawyer Guide to Leading Law Firms 1983-84, Vol. I, p. 820.

19/ The American Lawyer, September 1983, p. 13. According to the same article, other lawyers, with more experience, charge up to $350 an hour for their bankruptcy work.

PROPOSED AMENDMENT

Add the following subsection (g), immediately following subsection 4(f):

"(g) The provisions of this Act shall not apply unless the governmental entity against which fees and related expenses are to be assessed files with the agency or court which is to make the fee determination, at the time of its original pleading, certification that it has not, since the effective date of this Act:

"(1) Paid or agreed to pay any attorney more than $75 per hour;

"(2) Paid or agreed to pay any attorney, in a litigated or settled matter, a fee which is not contingent upon success in that matter;

"(3) Paid or agreed to pay any attorney prior to entry of a decision on the merits by the court or entry by an administrative officer of a final decision of an administrative proceeding."

Mr. **Rader**. Thank you very much, Mr. McTeer. I think if I catch the crux of your testimony that you suggest that this bill may threaten your clients' access to the courts.

Mr. **McTeer**. I am not saying that it will threaten their access. You know good and well that anybody can write on a napkin under rule 8, a document which is called a complaint. I am saying that they are entitled to the best, which is exactly, sir, what the defendants would expect—the best.

Mr. **Rader**. To quote from the first page, you say: * * * It threatens my clients' ability to go to court to try and enforce the civil rights laws of this Nation".

Mr. **McTeer**. I understand, sir. My problem semantically with you is the use of the term access.

Mr. **Rader**. Yesterday I called an established law firm in Greenville, MS, inquiring into the hourly rates that attorneys would charge for handling a particularly complex tort case. I learned that associates there with that established law firm would bill at a rate of $60 an hour, and that partners would bill at a rate of $70 an hour, perhaps $80 an hour, but they said not likely ever to be higher for their services. They are in Greenville, MS?

Why, then, would a cap of $75 an hour prevent your clients from finding an attorney in Greenville, MS?

Mr. **McTeer**. Because half of the other firms in the State of Mississippi would have said that the rate is between $60 and $112 now, and because of the fact that the U.S. District Court for the Northern District of Mississippi has said that the appropriate rate is between $60 and $112 per hour, sir.

Because of the fact that I would presume that the firm that you are making reference to defends civil rights actions and would like to see this legislation and others like it put into effect to limit the ability of plaintiffs to effectively litigate on behalf of plaintiffs.

Mr. **Rader**. I don't think this particular firm had any particular civil rights predisposition one way or the other. We just picked one right out of Martindale-Hubbell.

Mr. **McTeer**. Perhaps you might be able to name the firm for me and I could advise you

Mr. **Rader**. We just picked one out of Martindale-Hubbell; we picked Dyer, Dyer & Dyer.

Mr. **McTeer**. Dyer, Dyer & Dyer?

Mr. **Rader**. Yes.

Mr. **McTeer**. Excuse me, sir, but Dyer, Dyer & Dyer does not do insurance defense work and they do not charge an hourly basis.

Mr. **Rader**. We talked with several attorneys from that particular firm, and they gave us this report which tends to confirm that in Greenville, MS, the—

Mr. **McTeer**. Mr. Rader, with all due respect, Dyer, Dyer & Dyer has never handled a civil rights case. Dyer, Dyer & Dyer, to the best of my knowledge, sir—and I have known Gaines and his father and his brother real well—they have never done a civil rights case, defense or plaintiff. I don't even think they have done insurance defense work. They are primarily plaintiff tort contingency lawyers who work on a percentage basis.

Mr. **Rader**. So in a tort case, which would be similar to many of the tort cases brought under the Civil Rights Act of 1871, they would have given a fee of $60 an hour, and no higher than $80.

Mr. **McTeer**. Excuse me, sir.

Mr. **Rader**. I think the point that I am just trying to make is that there is clearly available very competent counsel, someone that you are familiar with.

Mr. **McTeer**. I think that you are completely mistaken because of a misunderstanding of the practical nature, the practice of law. Now, when a tort action is filed by an individual, he files on a contingency basis, one-third to one-half, based upon what he earns. He also, if he's successful, gets a portion of money which comes to him for cost.

The nature of the arrangement in civil rights cases, from both the defense side and the plaintiff side, is not based upon a contingency of that kind; it's based on a contingency hourly rate. The defense attorney always gets his hourly rate because it is paid to him as he bills it; plaintiff counsel can only get it at the end. You have a different set of circumstances.

Mr. **Rader**. You mention that you would be branded as a $75-an-hour attorney. Is it really a stigma to earn $75 an hour?

Mr. **McTeer**. It is a badge and indicia as well as a stigma, particularly when all the white lawyers are making about $100 or so an hour.

Mr. **Rader**. Is it really difficult to survive in Greenville on $75 an hour?

Mr. **McTeer**. It is extremely difficult to survive, and you ought to ask defense counsel whether or not that is not true.

Mr. **Rader**. How come this firm that I called manages to live, most of them, on $60 an hour?

Mr. **McTeer**. Because they also happen to get judgments well in excess of $200,000 and $300,000 occasionally on plaintiff tort actions of a contingency nature.

Mr. **Rader**. Didn't you tell me that you got a judgment of $140,000 in a recent case? Is that what you claimed at $85 an hour?

Mr. **McTeer**. No, no; we asked for it; we haven't gotten it. If we had gotten it, I might be some place else.

Mr. **Rader**. Well, thank you very much, Mr. McTeer, for your contribution to——

Mr. **McTeer**. By the way, I would like to say one thing, because you may recall—I did tell you this when I began on this particular subject—I asked for $140,000. My opponents got $170,000, while decrying my effort to get $140,000.

Now, you don't think that's fair, do you?

Mr. **Rader**. It strikes me that the purpose of these shifting statutes is to attract competent counsel to meritorious cases, not to provide penny-for-penny equal pay for lawyers on both sides of a case. I appreciate your effort to come before the subcommittee today, Mr. McTeer, and thank you for your contribution.

We will continue this hearing than, at a later date at the call of the Chair. Thank you.

[The subcommittee adjourned at 11:36 a.m.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

STINSON, MAG & FIZZELL
2100 CHARTERBANK CENTER
P. O. BOX 19251
KANSAS CITY, MISSOURI 64141-2251
(816) 842-8600

CABLE: "MAGTIM"
TELECOPIER: (816) 474-6882
TELEX: 42-4123

3745 INTERFIRST TWO
DALLAS, TEXAS 75270-2171
(214) 741-2200

February 2, 1984

Mr. Randy Rader
Constitutional Subcommittee
212 Dirkson Building
Washington, D.C.

Re: Housing Authority of
Kansas City - Payment
for Legal Fees to Legal Aid

Dear Mr. Rader:

I am writing as Chairman of the Housing Authority Board of Kansas City, Missouri to thank you for the appointment which we have with you on February 6, 1984 at 10:30 a.m. Joe Snorgrass, Executive Director of the Housing Authority of Kansas City, will accompany me. We would like to discuss with you the pending amendment to the fee award statute for attorneys.

We have recently completed litigation involving the legal services program in Kansas City, Missouri. I enclose for your information copies of correspondence which I have had with Mr. Gordon Gee, President of the Board of the legal services program, and with Donald Bogard, President of the Legal Services Corporation. I have received a response from Mr. Bogard telling me that his office is investigating the matter. I have not received any response from Mr. Gee. Apparently Legal Aid's position is that they will seek attorneys' fees from us.

Our experience with Legal Aid shows that the existence of this act and particularly the availability of fees from public agencies such as the Housing Authority to Legal Aid encourages litigation and discourages the settlement of litigation once it is commenced. In the lawsuit mentioned in the letter the attorneys were told on the day the suit was filed that we would hold a hearing and that procedures would be reviewed and implemented after their review to cover issues raised by them in regard to terminations from Section 8 programs.

Despite this Legal Aid continued to litigate the matter for a period of eight months and sought over $20,000 in attorneys' fees. At one point we were given the option of agreeing to reporting to Legal Aid for three years on our Section 8 program or paying attorneys' fees to them. We did not accept either option and are not reporting to Legal Aid. They finally dismissed their lawsuit as moot and then filed for attorneys' fees. We resisted the attorneys' fee application and after a lengthy hearing were advised by the trial judge that he would be inclined to give an award of from $7,000 to $10,000. On that basis we determined that it would not be economically feasible to continue resisting payment and agreed to a payment of $8,500.

We have been advised in another suit filed by Legal Aid that they are not questioning our actions in this matter but are questioning "national HUD policy". They have indicated to us informally that if we will work with them to "get HUD" they will not seek attorneys' fees from us. We are defending this lawsuit and will not cooperate with them.

I look forward to discussing these matters with you and encourage you to consider inclusion of provisions in the amendment to curb these abuses.

I look forward to seeing you next week.

Sincerely,

J. Michael Dorsey, Chairman
Board of Commissioners
Housing Authority of Kansas City,
Missouri

JMD:mls
Enclosures

cc: Mr. Joseph Snorgrass

STINSON, MAG & FIZZELL
2100 CharterBank Center
P. O. Box 19251
Kansas City, Missouri 64141-2251
(816) 842-8600

Cable: "MAGTIM"
Telecopier (816) 474-6882
Telex 42-4123

3745 InterFirst Two
Dallas, Texas 75270-2171
(214) 741-2200

November 8, 1983

Mr. Gordon D. Gee
Rich, Granoff, Levy & Gee
2300 City Center Square
1100 Main Street
P.O. Box 26278
Kansas City, Missouri 64196

Dear Gordon:

I am writing following the special board meeting of the Housing Authority on November 7, 1983. The purpose of this meeting was to consider the Authority's position in regard to the application for attorneys fees filed by Legal Aid in the Mallonee Lee v. HAKC case. We also discussed Legal Aid's policy of seeking attorneys fees from the Housing Authority. Enclosed is a resolution which was adopted at our board meeting. The resolution went through several drafts prior to the meeting and during the course of the meeting and became stronger with each draft. Members of the board of commissioners feel very strongly that the policy of Legal Aid in seeking attorneys fees from the Housing Authority is inappropriate and should be reconsidered.

In addition to the opposition of the commissioners, Betty Scott, president of the Wayne Miner Tenant Association, and Argentine Solomon, president of the Riverview Tenant Association, both expressed their opposition to this policy and further stated that their organizations were not represented by Legal Aid.

I appreciated the opportunity to meet with you, Jo Ann Raphael and Michael Thompson on October 26, 1983 to discuss the question of Legal Aid's policy of seeking attorneys fees from the Housing Authority. I understand from this meeting that this issue will be a topic of discussion at your next board meeting.

As you know, I believe that some staff attorneys at Legal Aid resent the changes in the Housing Authority's relationship with them which have occurred since I became chairman of the board and Jim Clay and then Joe Snorgrass were employed as directors. Prior to our coming to the Housing Authority Legal Aid staff attorneys participated on "committees" which were appointed by the chairman of the board of commissioners to study and revise many of the policies and procedures of the Housing Authority. Our perception of the resulting procedures was that they were at best cumbersome and difficult if not impossible to administer. It was apparent that the procedures were not designed to insure the efficient operation of the Housing Authority. The policy which we have adopted for the implementation of new procedures is consistent with HUD regulation and sound business practices. Under the new policy our staff drafts proposed changes in procedures and submits them as required to our tenants and tenant organizations for comment. If the tenants or the tenant organizations are represented by Legal Aid and if they request Legal Aid's assistance in reviewing the proposed changes then we have no problem with Legal Aid reviewing and commenting on the proposed changes.

It is apparent to me that this change of policy has been met with resistance by some of your staff attorneys. I was told prior to the filing of the Mallonee Lee lawsuit that one reason the suit would be filed was that staff attorneys felt that "no one would talk to them at the Housing Authority". Following the filing of the lawsuit a meeting was held by Joe Snorgrass, our executive director, with Michael Thompson, then director of Legal Aid, and several staff attorneys. My understanding from Joe following the meeting was that there were several topics discussed and he felt that there was some understanding by staff attorneys of the policies and procedures of the Authority. Within a month following that meeting an additional lawsuit was filed by Legal Aid challenging the calculation of utility allowances at the Authority. This was a topic of conversation at this meeting and our procedure and timetable for reviewing utility allowances was discussed with Legal Aid at the time of the meeting. The filing of this lawsuit following the meeting which was held at the request of Legal Aid was taken as a slap in the face by the board and staff of the Housing Authority.

Our perception that Legal Aid wants to write our procedures and supervise our operation was further strengthened by letters received prior to the filing of the Mallonee Lee suit in which staff attorneys requested to draft procedures for Section 8 termination hearings. We had told them prior to receiving the letters and upon receiving the letters that we would review and consider our own procedures and since they had a client with an interest we would provide them with a copy of the procedures for their review. Within a week following the lawsuit staff attorneys sent us a draft of procedures for Section 8 termination hearings. We again explained to them that we would not review their draft but would prepare our own draft of procedures for their review. Within three weeks following the filing of the lawsuit a hearing was held for the named plaintiff following procedures agreed to by Legal Aid. A draft of procedures to be followed in Section 8 termination proceedings was prepared and presented to Legal Aid for review by the first week of March. These procedures were reviewed and negotiated with Legal Aid and implemented by the Authority. Legal Aid continued to prosecute the lawsuit with extensive requests for discovery, class action certification, briefs, motions, etc., filed during the course of negotiations on the procedure and even after the procedures were implemented.

We received an offer of settlement during the first part of June of this year which involved reporting quarterly to Legal Aid for a period of three years on all of our Section 8 operations. Because we feel we are doing a good job in the operation of this program and because we are required by contract to provide this information to HUD we do not feel it appropriate to submit to review by Legal Aid staff attorneys. On this basis we rejected the proposed settlement offer. We were told by your attorneys at that time that we had a choice of submitting to review by Legal Aid or they would "seek attorneys fees". We took this as an effort to force us to choose between submitting to review by an organization which we consider to have contributed to many of the problems which plagued the Housing Authority in the past or to buy off Legal Aid by payment of attorneys fees. We rejected both options.

We recognize the need to comply with HUD regulations in all of our operations and to provide due process in our dealings with our tenants. We welcome suggestions and comments from interested persons in the operation of the Authority. We resent, however, the implication made by some of your staff attorneys that we are not operating the Authority in good faith and are in need of constant monitoring and supervision by them.

We further question the practice of your staff attorneys in demanding information from the Housing Authority and threatening litigation without the identification of the client being represented. I have provided you with copies of four letters which we received on July 16, 1983. One letter identifies a client, another letter indicates that a client is represented but the client is not identified, the other two letters indicate clearly that no client is represented but that the information is sought anyway. While we recognize the right of Legal Aid to represent its clients and to vigorously pursue legal remedies in protection of its client's interest we do not feel that Legal Aid has the right to take on the role of "general protector" and make demands of us without a client. We have informed your staff that we will respond only to requests for information from them which include identification of a specific client represented. We will continue to adhere to this policy and request that your staff attorneys recognize the necessity of it.

As a former Legal Aid attorney I am particularly concerned by the activities of your staff attorneys in "fishing" for information without clients. It is apparent to me that some of your staff attorneys are not representing clients and pursuing legal remedies based on a legal problem of that client. They are instead identifying causes and then attempting to locate individuals to "fit the case". This method of practicing law at Legal Aid has been the subject of nationwide criticism. I regret that it has become prevalent at Legal Aid of Western Missouri.

Sincerely,

J. Michael Dorsey, Chairman
Board of Commissioners
Housing Authority of Kansas City

JMD:mls

STINSON, MAG & FIZZELL
2100 CHARTERBANK CENTER
P. O. BOX 19251
KANSAS CITY, MISSOURI 64141-2251
(816) 842-8600

CABLE: "MAGTIN"
TELECOPIER: (816) 474-6882
TELEX: 42-4123

3745 INTERFIRST TWO
DALLAS, TEXAS 75270-2171
(214) 741-2200

December 2, 1983

Mr. Donald Bogard
President
Legal Services Corporation
733 - 15th St. N.W.
Washington, D.C. 20005

Dear Mr. Bogard:

I am writing as chairman of the board of commissioners of the Housing Authority of Kansas City, Missouri. I have been chairman for two years. When I became chairman of the Authority it was a mess. Since that time we have made substantial progress in providing decent, safe and sanitary housing for poor people in Kansas City.

A continuing problem which we have faced in making changes in policies and procedures at the Authority has been the consistent opposition of Legal Services attorneys from Legal Aid of Western Missouri. Prior to becoming chariman the consistent approach of the previous chairman had been to appoint one or more Legal Services attorneys to committees to "study and report" on issues to the board of commissioners. The Legal Services attorneys prepared drafts for discussion and the resulting policies and procedures were not consistent with good management practices. Many of these procedures and policies have been substantially altered now. In making changes in policies we have followed HUD comment requirements including, where appropriate, review by Legal Services attorneys who were contacted by client groups. We have received consistent criticism from Legal Services attorneys for this approach and repeated requests from Legal Services attorneys to "assist in drafting your procedures". We have refused to agree to go back to the previous method because we believe that it was one of the many causes of the problems which plagued the Housing Authority in the past.

Mr. Donald P. Bogard December 2, 1983

Enclosed is a copy of a letter which I have sent to Gordon Gee, president of the board of directors of Legal Aid of Western Missouri outlining the result of staff attorneys' frustration at our methods.

I want to make clear that I am not an opponent of the Legal Services Corporation nor of Legal Aid of Western Missouri. I retain my support for the concept of Legal Services and for the need for lawyers for poor people. I am extremely concerned however about the activities of several attorneys at Legal Aid of Western Missouri.

I would appreciate any assistance you can give in limiting Legal Aid of Western Missouri to the representation of clients and eliminating their practice of trying to "supervise" the Housing Authority.

Thank you for your attention to this matter.

Sincerely,

J. Michael Dorsey, Chairman
Board of Commissioners
Housing Authority of Kansas City

JMD:mls
Enclosure

cc: Senator John Danforth
Senator Thomas Eagleton
Congressman Alan Wheat
Mayor Richard Berkley

**Housing Authority of
Kansas City, Missouri**

February 23, 1984

Mr. Randall R. Rader
Constitution Subcommittee
United States Senate
Committe on the Judiciary
Washington, D. C. 20510

Dear Mr. Rader:

Thank you for meeting with Mr. Dorsey and me during our recent visit to Washington. We appreciated the frankness and candor of your responses to the issues we discussed regarding Legal Aid of Western Missouri tactics and policies, particularly relating to seeking legal fees from Public Agencies.

Current policies and practices of Legal Aid in Kansas City, encourages litigation and discourages settlement of litigation once it is commenced. In fact, it renders pre-litigation settlement efforts fruitless and disfunctional.

It is our intent to continue to vigorously oppose this policy. Attached are pleadings and other correspondence relating to litigation where legal fee issues are involved. In addition, I have provided copies of correspondence from Legal Aid which are obviously examples of 'Witch Hunting' and 'Fishing' for potential law suits.

If Mr. Dorsey or I may be of assistance to the Constitution Subcommittee or to Mr. Kevin McGinnis, please advise.

Sincerely,

J. Anthony Snorgrass
Executive Director

JAS/brl

cc: Dorsey
McGinnis

299 Paseo
Kansas City, MO 64106
(816) 842-2440

cc: Lou WADE w/ E.D. REPORTS
FROM HAKC - JULY, '83

Legal Aid of Western Missouri
1103 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750

MICHAEL THOMPSON
Executive Director

July 15, 1983

J. Anthony Snorgrass
Executive Director
Housing Authority of
Kansas City, Missouri 1016 Locust
Kansas City, Missouri 64106

Dear Mr. Snorgrass:

This will confirm our telephone conversation on July 8, 1983, concerning my letter of July 7, 1983, in which I requested certain documents and information from you concerning the Housing Authority of Kansas City, Missouri. You stated on July 8, 1983 that you would not provide me this information.

The information I have requested in writing consist of the following: a. the Executive Director's Report to the Board of Commissioners with respect to the April 18, 1983 board meeting; b. the Executive Director's Report to the Board of Commissioners with respect to the May 17, 1983 board meeting; c. the Table indicating vacancy totals discussed at the May 17, 1983 board meeting; d. Executive Director's Report to the Commissioners for all board meetings beginning with June, 1983 and continuing in the future.

It is my belief that you cannot lawfully deny this informtion to me. I am therefore requesting that you reconsider your determination of July 8, 1983 that I may not have access to these requested documents. It is important that I have access to information about the Housing Authority's activities if I am going to competently serve my clients. If I do not hear from you within ten days of the date of this letter, I will assume that you continue to refuse me access to these documents, and I will consider further action against the Housing Authority, which may include litigation.

Sincerely,

Kelly P. Finn

Kelly P. Finn
Attorney at Law

KPF/js

AN EQUAL OPPORTUNITY EMPLOYER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MALLONEE M. LE, et al.,
Plaintiffs,) Civil Action No. 83-0152-CV-W-6
v.
HOUSING AUTHORITY OF KANSAS CITY,
MISSOURI, et al.,
Defendants.)

REQUEST FOR HEARING

COMES NOW Housing Authority of Kansas City, Missouri and Snorgrass, by and through their attorney of record and hereby request and evidentiary hearing in regard to Plaintiffs' Application for Attorney's Fees.

KOENIGSDORF, KUSNETZKY & WYRSCH

By
LOUIS J. WADE #29034
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 221-0080

I hereby certify that a copy of the foregoing was mailed this 10th day of November, 1983, to:

Julie Levin, Esq.
and
Kelly Finn, Esq.
Legal Aid of Western Missouri
Professional Building, 4th Floor
1103 Grand
Kansas City, MO 64106

Louis J. Wade

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MALLONEE M. LEE, et al., Plaintiffs,	
vs.	Civil Action Number 83-0152-CV-W-6
HOUSING AUTHORITY OF KANSAS CITY, MISSOURI, et al. Defendants.	

SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR ATTORNEY'S FEES PURSUANT TO 42 U.S.C. SECTION 1988

COMES NOW Housing Authority of Kansas City, Missouri (hereinafter "HAKC") and J. Anthony Snorgrass (hereinafter "Snorgrass"), by and through their attorney of record, and for their Suggestions in Opposition to Plaintiffs' Application for Attorney's Fees Pursuant to 42 U.S.C. Section 1988, and in support of their Request for an Evidentiary Hearing state to the Court as follows:

A. FACTUAL BACKGROUND

The events leading up to the filing and disposition of this matter are as follows:

1. December 6, 1982 - Mallonee Lee (hereinafter "Lee") signed a Notice of Intent to Vacate her residence at 5816 Wabash (hereinafter "Old Residence");

2. January 7, 1983 - Lee moves to new residence at 3842 East 68th Terrace (hereinafter the "New Residence") and HAKC refuses to process Request For Lease Approval (hereinafter "RLA") at New Residence due to damage claim by Landlord as required by federal regulation (See, 24 C.R.F. 882.209(c) and HUD Handbook, "Public Housing Agency Administrative Practices Handbood For The Section 8 Existing Housing Program," (hereinafter the "Handbook"), Chapter 7, Section 7-3(a)(2), November, 1979.).

3. December 6 - January 7, 1983 - HAKC sends investigator

to Old Residence, finds some damage claims valid and some invalid, informs Lee of findings.

4. February 11, 1983 - Lee files suit claiming lack of procedural due process in determination of damages.

5. February 11, 1983 - HAKC, pursuant to TRO, without opposition, pays January and February rent for Lee.

6. February 25, 1983 - Hearing held, Lee contests damages, finding of $90.00 in damages caused by Lee.

7. March 4, 1983 - Lee pays $90.00 in damages; HAKC manually processes Lee's RLA; pays March rent. Lee had received all due process which she claimed was due in her complaint. Fees of Lee's counsel to this date are approximately $2,500.00, based on the application.

8. March 9, 1983 - After exchanging drafts of procedures, counsel for Lee and HAKC meet to discuss procedures.

9. March 28, 1983 - Deborah Woods (hereinafter "Woods") added as Plaintiff, HAKC offers opportunity for hearing to Woods, who had never before raised a question, and who had moved without notice, after a fire, in September, 1982.

10. June 14, 1983 - After lengthy discussions, final procedures formally adopted by HAKC Board of Commissioners, HAKC rejects any reporting to Legal Aid as part of settlement.

~~11. June 20, 1983 - Conference with Court to continue class~~ certification hearing; the Court suggested case was moot at that time. Fees of Lee's counsel to this date, based upon the application, are appoximately $10,000.00.

12. July 17, 1983 - Hearing held regarding Woods' claims.

13. August 25, 1983 - Lee's counsel filed Motion to Dismiss Due to Mootness, claiming all relief sought already obtained as of June, 1983 when procedures adopted by HAKC, and Lee dismisses request for class certification.

B. LEGAL CONTEXT AND STANDARD OF REVIEW

The first step in evaluating a claim for attorney's fees is a review of the hours spent. This approach, however, can be seriously misleading because Plaintiff has the burden of proving all attorney's fees requested the same as any claim for money damages. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974) (hereinafter "Johnson"). The "Lodestar" figure of hours spent times an hourly rate is therefore just a beginning point. The Court must scrutinize all applications for duplication of efforts, particularly where more than one attorney is involved. Johnson. The Court must also be careful to eliminate all excessive hours, to avoid awarding an attorney for over-preparation of a simple case. The fee awards to be awarded under Section 1988 were never intended to constitute a "fee bank" for the welfare of attorneys. Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981). This Court must examine the reasonableness and necessity of all hours spent to determine the appropriate fee. The Court should be careful to avoid an award of attorney's fees which would constitute a "windfall" to the attorneys. Avalon Cinnamon Corp. v. Thompson, 689 F.2d 137 (8th Cir. 1982). (After trial and appeal, a zoning ordinance attempting to eliminate "adult" movie houses was found unconstitutional, for which a total fee award of approximately $19,000.00 was allowed).

C. FACTORS AFFECTING LEE'S CLAIM FOR ATTORNEY'S FEES

1. Case Not Especially Difficult Or Complex

There was never a class action certification hearing in regard to Lee's claim. There has never been a hearing in regard to any matter raised by Lee. The only appearances involving the Court have been conferences, in chambers, with the Court. The issues of due process raised were neither especially difficult nor extremely complex. Any difficulty or complexity was significantly reduced by HAKC's willingness from the first day to review and revise procedures as necessary. The need for all the discovery, conferences, motions, class motions and briefs in support thereof was severely in doubt even as early as February

23, 1983. (On that date the Court questioned the necessity of class certification referring to Collins v. Marshall, 507 F.Supp. 83, 84 (W.D. Mo. 1982). The Court must consider these factors in determining the total fees to be awarded. See, Johnson.

2. Similar Cases Award Much Lower Fees

In a class action case which was tried and litigated through the appeal stage, an award of just under $15,000.00 (less than that requested by Lee's counsel) was held to be appropriate. Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976). In another case litigated through on motions for summary judgment and appealed over a two year period, a $62,000.00 fee request was reduced to $3,640.00 based upon the time that reasonably should have been required to properly handle the case. Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

3. Excessiveness of Fee Request

On the face of the application, the fee request by Lee's counsel would appear wholly unreasonable. For example, Julie Levin requests fees for time exceeding 19.5 hours for drafting a "Second T.R.O.", which is in fact, a two page document drafted in chambers, with the help of the Court and opposing counsel. Kelly Finn requests an additional 10 hours for such drafting. Further, such re-drafting was only necessary because Lee's first T.R.O. was so improperly and overly broad, ill defined and inappropriate that the Court simply could not sign the prepared document. Various other requests for time are similarly, apparently, excessive. For example, on July 1st and 6th, Julie Levin and Kelly Finn request, respectively, 5.5 and 7.0 hours, or a total of 12.5 hours, for review of documents. (This discrepancy is unexplained and inexplicable, since they were both present at the same time.) On the other hand, Kelly Finn, in an affidavit dated and filed August 15, 1983 claimed that the total time necessary for review of such documents should not exceed 4.0 hours.

4. No Reason Continue Litigation After June 14, 1983

Lee's counsel also attempts to imply that HAKC or Snorgrass had refused to use procedures which were adopted by the Board of Commissioners of HAKC. In referring to Snorgrass' letter dated June 27, 1983, the Court is simply mislead in the suggestions filed by Lee. The letter referred to a situation which, as the letter clearly states, was not a termination of benefits by HAKC, but was instead a lawsuit on file in state court by the landlord for non-payment of rent. HAKC was not involved in a termination proceeding for which the adopted procedures would apply. In fact, the use of such procedures in that type of case is specifically prohibited by federal statute and regulation. (See, Housing and Communikty Development Amendments of 1981, Section 326(c), amending U.S. Housing Act, 42 U.S.C. 1437(8)(d)(1)(B), and HUD Handbook 7420.7, Chg-2, October 18, 1982.)

5. Award of Fees Must Be Carefully Circumscribed To Avoid Unnecessary Large Awards

HAKC and Snorgrass do not dispute the award of some fees to Lee's counsel. On the other hand, the requested award is grossly excessive, appears to contain numerous duplications, and requests an award for much time which was unnecessarily, or unreasonably spent. The factual discrepancies which appear throughout the request for fees should be examined more closely through a full evidentiary hearing at which HAKC and Snorgrass would have the right to cross examine counsel and present complete evidence as well as expert testimony, regarding the reasonableness and necessity of time expended by counsel. The Court should guard against "vicarious genorosity", or "over generosity" in awarding attorney's fees. Twentieth Century Fox Film Corporation v. Brookside Theater Corp., 194 F.2d 846, 859 (8th Cir., cert denied, 343 U.S. 942 (1952)); Locklin v. Day-glow Color Corp. 378 F.Supp. 423, 426 (N.D. Ill. 1974). A party is not entitled to needlessly accumulate exorbitant fees and expect the other party to "pick up the entire tab." *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 871 (8th Cir. 1977).

Lee filed her suit and received all relief which she had requested within two weeks. The entire suit was moot, on February 25, 1983. The "paranoia" evidenced by Lee's counsel's unwillingness to admit that proper procedures were being followed after June 14, 1983, should not serve as a basis for punishing HAKC by an increased fee award.

CONCLUSION

For all of the foregoing reasons, HAKC and Snorgrass respectfully request that this Court set a date for an evidentiary hearing to further examine those matters raised in the fee application submitted by Lee's counsel, and only upon a full hearing award a reasonable sum for attorney's fees.

KOENIGSDORF, KUSNETZKY & WYRSCH

By: _____________________________
Louis J. Wade
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
221-0080

ATTORNEYS FOR DEFENDANTS

Copy of the above and
foregoing was mailed this
10 day of [illegible], 1983, to:
Julie Levin, Esquire
and
Kelly Finn, Esquire
Legal Aid of Western Missouri
Professional Bldg., 4th Floor
1103 Grand
Kansas City, Mo. 64106
Attorneys for Plaintiff

RESOLUTION ADDRESSING LEGAL AID'S REQUEST FOR IN EXCESS OF $18,694.00 FOR LEGAL/ATTORNEY FEES FROM THE HOUSING AUTHORITY

WHEREAS, Legal Aid of Western Missouri has filed a petition for Legal/Attorney Fees in excess of $18,694.00 from HAKC in the case of Lee v. HAKC;

WHEREAS, the payment of such fees would be a burden on the Housing Authority operations, and would reduce the ability of the Housing Authority to provide quality housing services and to pursue planned physical, management, and tenant service programs, as well as other improvements;

WHEREAS, the pursuit and outlay of HAKC funds for the purpose of compensating Legal Aid can be considered a duplication of legal expenses imposed upon the Housing Authority, tenants and taxpayers;

WHEREAS, the policy of Legal Aid in pursuing legal fees from a public entity such as the Housing Authority which is dedicated to serve persons in need of housing is directly in opposition to the basic philosophy upon which legal aid was founded, the protector has become the perpetrator of crimes against the poor;

NOW THEREFORE BE IT RESOLVED, that the Board of Commissioners opposes the request for payment of $18,694.00 in legal expenses and attorney fees made by Legal Aid of Western Missouri in conjunction with the Lee v. HAKC litigation and its policy implications and directs the Executive Director to take steps to vigorously defend HAKC in this matter;

BE IT FURTHER RESOLVED, that the Board of Commissioners of HAKC states that it is opposed to the policy of Legal Aid in seeking fees from the Housing Authority and that this opposition shall be communicated to the Board of Directors of Legal Aid.

T. B. WATKINS TENANT ASSOCIATION

1301 Vine Street
Kansas City, Missouri 64106

Florine Jones
President

Snodgrass

November 10, 1983

Ms. JoAnn Raphael, Executive Director
Legal Aid of Western Missouri
1103 Grand Avenue 4th Floor
Kansas City, Missouri 64106

Dear Ms. Raphael:

I am very much disturbed to hear that your agency is requesting that the Housing Authority of Kansas City pay $18,694.00 in attorney fees for the Mallonee Lee vs HAKC lawsuit. To my knowledge the Housing Authority has settled this matter and Mallonee Lee still lives in public housing.

It has always been my belief that Legal Aid is paid by the government to represent individuals who cannot afford to pay for legal assistance and the same government provides public housing for the needy people that you assist. To make such an outrageous request of $18,694.00 can only hurt the tenants of public housing.

If you review your records you will find that a number of public housing tenants have been assisted by your agency concerning conditions in public housing, and thanks to the services you render there have been great improvements in the quality of housing for the poor.

The $18,694.00 is money that can be used to further improve living conditions in public housing, which are needed, as I am sure you are aware. So why take $18,694.00 from the disadvantaged who reside in public housing developments?

If this allowed to happen you are actually defeating your agency's own purpose. You are suppose to help the needy, and I can't see something like this happening. I am totally opposed.

Sincerely,

Florine E. Jones

Florine Jones, President
T.B. Watkins Tenant Association

FJ/eh

STINSON, MAG & FIZZELL
2100 CharterBank Center
P. O. Box 19251
Kansas City, Missouri 64141-2251
(816) 842-8600

Cable: "[illegible]"
Telecopier (816) 474-6882
Telex 42-4123

3745 InterFirst Two
Dallas, Texas 75270-2171
(214) 741-2200

November 8, 1983

Mr. Gordon D. Gee
Rich, Granoff, Levy & Gee
2300 City Center Square
1100 Main Street
P.O. Box 26278
Kansas City, Missouri 64196

Dear Gordon:

I am writing following the special board meeting of the Housing Authority on November 7, 1983. The purpose of this meeting was to consider the Authority's position in regard to the application for attorneys fees filed by Legal Aid in the Mallonee Lee v. HAKC case. We also discussed Legal Aid's policy of seeking attorneys fees from the Housing Authority. Enclosed is a resolution which was adopted at our board meeting. The resolution went through several drafts prior to the meeting and during the course of the meeting and became stronger with each draft. Members of the board of commissioners feel very strongly that the policy of Legal Aid in seeking attorneys fees from the Housing Authority is inappropriate and should be reconsidered.

In addition to the opposition of the commissioners, Betty Scott, president of the Wayne Miner Tenant Association, and Argentine Solomon, president of the Riverview Tenant Association, both expressed their opposition to this policy and further stated that their organizations were not represented by Legal Aid.

I appreciated the opportunity to meet with you, Jo Ann Raphael and Michael Thompson on October 26, 1983 to discuss the question of Legal Aid's policy of seeking attorneys fees from the Housing Authority. I understand from this meeting that this issue will be a topic of discussion at your next board meeting.

As you know, I believe that some staff attorneys at Legal Aid resent the changes in the Housing Authority's relationship with them which have occurred since I became chairman of the board and Jim Clay and then Joe Snorgrass were employed as directors. Prior to our coming to the Housing Authority Legal Aid staff attorneys participated on "committees" which were appointed by the chairman of the board of commissioners to study and revise many of the policies and procedures of the Housing Authority. Our perception of the resulting procedures was that they were at best cumbersome and difficult if not impossible to administer. It was apparent that the procedures were not designed to insure the efficient operation of the Housing Authority. The policy which we have adopted for the implementation of new procedures is consistent with HUD regulation and sound business practices. Under the new policy our staff drafts proposed changes in procedures and submits them as required to our tenants and tenant organizations for comment. If the tenants or the tenant organizations are represented by Legal Aid and if they request Legal Aid's assistance in reviewing the proposed changes then we have no problem with Legal Aid reviewing and commenting on the proposed changes.

It is apparent to me that this change of policy has been met with resistance by some of your staff attorneys. I was told prior to the filing of the Mallonee Lee lawsuit that one reason the suit would be filed was that staff attorneys felt that "no one would talk to them at the Housing Authority". Following the filing of the lawsuit a meeting was held by Joe Snorgrass, our executive director, with Michael Thompson, then director of Legal Aid, and several staff attorneys. My understanding from Joe following the meeting was that there were several topics discussed and he felt that there was some understanding by staff attorneys of the policies and procedures of the Authority. Within a month following that meeting an additional lawsuit was filed by Legal Aid challenging the calculation of utility allowances at the Authority. This was a topic of conversation at this meeting and our procedure and timetable for reviewing utility allowances was discussed with Legal Aid at the time of the meeting. The filing of this lawsuit following the meeting which was held at the request of Legal Aid was taken as a slap in the face by the board and staff of the Housing Authority.

Our perception that Legal Aid wants to write our procedures and supervise our operation was further strengthened by letters received prior to the filing of the Mallonee Lee suit in which staff attorneys requested to draft procedures for Section 8 termination hearings. We had told them prior to receiving the letters and upon receiving the letters that we would review and consider our own procedures and since they had a client with an interest we would provide them with a copy of the procedures for their review. Within a week following the lawsuit staff attorneys sent us a draft of procedures for Section 8 termination hearings. We again explained to them that we would not review their draft but would prepare our own draft of procedures for their review. Within three weeks following the filing of the lawsuit a hearing was held for the named plaintiff following procedures agreed to by Legal Aid. A draft of procedures to be followed in Section 8 termination proceedings was prepared and presented to Legal Aid for review by the first week of March. These procedures were reviewed and negotiated with Legal Aid and implemented by the Authority. Legal Aid continued to prosecute the lawsuit with extensive requests for discovery, class action certification, briefs, motions, etc., filed during the course of negotiations on the procedure and even after the procedures were implemented.

We received an offer of settlement during the first part of June of this year which involved reporting quarterly to Legal Aid for a period of three years on all of our Section 8 operations. Because we feel we are doing a good job in the operation of this program and because we are required by contract to provide this information to HUD we do not feel it appropriate to submit to review by Legal Aid staff attorneys. On this basis we rejected the proposed settlement offer. We were told by your attorneys at that time that we had a choice of submitting to review by Legal Aid or they would "seek attorneys fees". We took this as an effort to force us to choose between submitting to review by an organization which we consider to have contributed to many of the problems which plagued the Housing Authority in the past or to buy off Legal Aid by payment of attorneys fees. We rejected both options.

We recognize the need to comply with HUD regulations in all of our operations and to provide due process in our dealings with our tenants. We welcome suggestions and comments from interested persons in the operation of the Authority. We resent, however, the implication made by some of your staff attorneys that we are not operating the Authority in good faith and are in need of constant monitoring and supervision by them.

We further question the practice of your staff attorneys in demanding information from the Housing Authority and threatening litigation without the identification of the client being represented. I have provided you with copies of four letters which we received on July 16, 1983. One letter identifies a client, another letter indicates that a client is represented but the client is not identified, the other two letters indicate clearly that no client is represented but that the information is sought anyway. While we recognize the right of Legal Aid to represent its clients and to vigorously pursue legal remedies in protection of its client's interest we do not feel that Legal Aid has the right to take on the role of "general protector" and make demands of us without a client. We have informed your staff that we will respond only to requests for information from them which include identification of a specific client represented. We will continue to adhere to this policy and request that your staff attorneys recognize the necessity of it.

As a former Legal Aid attorney I am particularly concerned by the activities of your staff attorneys in "fishing" for information without clients. It is apparent to me that some of your staff attorneys are not representing clients and pursuing legal remedies based on a legal problem of that client. They are instead identifying causes and then attempting to locate individuals to "fit the case". This method of practicing law at Legal Aid has been the subject of nationwide criticism. I regret that it has become prevalent at Legal Aid of Western Missouri.

Sincerely,

J. Michael Dorsey, Chairman
Board of Commissioners
Housing Authority of Kansas City

JMD:mls

TESTIMONY OF THE RISK AND INSURANCE MANAGEMENT SOCIETY, INC., SUBMITTED BY JON HARKAVY

The Risk and Insurance Management Society, Inc. (RIMS) strongly supports S.141, legislation which will maintain strong civil rights protection for our citizens without imposing unreasonable burden on municipalities and local governments. RIMS is a non profit organization representing corporate and governmental bodies in 77 Chapters located throughout the United States and Canada. As risk managers, our deputy members are responsible for not only the procurement of insurance, but also for loss prevention and control, risk analysis, administration of self insurance programs, and other activities required to protect both the present and future assets of their employer. In the case of the public entity risk manager, these assets, of course, are those of the local government.

The original intent of the Civil Rights Act of 1871 (42 U.S.C. §1983) was to allow civil actions for deprivation of constitutional rights caused by individuals acting "under color of state law". The importance of providing individual protection from officially sanctioned violations of constitutional rights is a vital today as it was over a century ago. However, as so aptly pointed out by Senator Hatch in the January 26, 1983 Congressional record". . . The Supreme court significantly broadened the interpretation of Section 1983 in ways that have little or nothing to do with anyone's constitutional rights, but will wreak havoc in the ability of our local governments to perform important services to the public."

In the case of Maine v. Thiboutot, 448 U.S. 1 (1980),the Supreme Court ruled for the first time ever, that the phrase "and laws" was intended by Congress to provide a Section 1983 remedy for deprivation of rights secured by any law of the United States. This decision extends the application of Section 1983 to all joint Federal regulatory endeavors, resource management activities, and grant programs from the Marine Mammal Protection Act to the Urban Mass Transportation Act.

In Owens v. City of Independence, 445 U.S. 622 (1980), the Supreme Court further expanded the liability of the public entity under Section 1983, by denying the local government the good faith defense. This means that the local government may be held liable in damages under Section 1983 regardless of the reasonableness of its officials' belief that the conduct in question was legal. Under Owens the municipality is liable for failing to anticipate future Supreme Court interpretations of constitutional law; in effect for violating a constitutional right which was unknown to anyone when the event ocurred. As a result, local governments are forced to adopt and implement policy without the assurance that a careful, reasonable, and apparently legal policy determination will protect them from liability.

As if this expanded liability was not enough to invite a deluge of litigation, the courts opened the floodgates even further by ruling that under the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. §1988), attorney's fees are available in any Section 1983 action. The availability of such fees has prompted the initiation of many suits which can most charitably be described as frivolous.

A survey by the National Institute of Municipal Law Officers gives some sense of the liabilities municipalities are facing from Section 1983 litigation. The survey revealed that there were over $4.78 billion in pending damages claims under Section 1983 against a sampling of 200 cities. A very conservative estimate would indicate that 23,000 suits were brought alleging Section 1983 claims against state and local governments or officials in 1981 alone, as compared to the year 1961 when only 270 such suits were brought.

What is the impact of this surge of Section 1983 litigation? Court dockets, already crowded, have become more so. Local tax dollars, desperately needed by our municipalities to provide social services, are being increasingly channeled for defense costs and damage claims. Local officials, forced to "handicap" future court interpretations as to their municipality's Section 1983 liabilities, are fearful to carry out many basic administrative responsibilities, lest their action or inaction prompt huge damage claims against their localities. Public entity attorneys, faced with the possibility of further expansive decisions by the Court as to local government's Section 1983 liabilities are prompted to settle numerous claims, which in the past would have clearly been considered non-meritoricus.

The public entity risk manager's function has been made similarly difficult, if not impossible, by this onslaught of Section 1983 litigation. How can one design programs to protect against potential municipal liability if the guidelines as to such liability are constantly and often drastically expanded? Similarly, how can one set aside reserves or purchase insurance to cover the local government against Section 1983 damage claims, when the risk cannot be measured on the basis of past patterns of liability because the liability is constantly being expanded? Insurance, if available at all, is often prohibitively expensive because of the insurers understandable reluctance to underwrite a risk which has become increasingly open-ended.

Most tragically, if one assumes that the basic goal of the Civil Rights Act of 1871 is to deter the illegal conduct of municipal governments and officials, little, if any, public good is being afforded by this expanded Section 1983 liability. What deterrence is being afforded by a reading of Section 1983 which makes a municipality liable when a public official did not know, and could not know that his or her actions violated a constitutional norm?

Moreover, under this spate of Section 1983 litigation, the Civil Rights Act of 1871 is quickly being transformed from a statute protecting our constitutional civil rights to a catch all remedy for any individual disatisfied with the administration of any federal/state/local joint endeavor. RIMS recognizes the absolute vital importance of protecting our citizens from municipal misconduct jeopardizing our citizens' constitutional civil rights including but not limited to equal employment opportunities and equality in the administration of public services. Indeed it is our position that the integrity of the act is being undermined by the utilization of Section 1983 as an all inclusive remedy for the infringement, no matter how small, of any and all federal statutes and federally funded programs.

RIMS strongly supports S. 141 as legislation which strikes an equitable balance between two very important considerations - the constitutional rights of individuals and the ability of local governments to serve all the people. Under this legislation any individual denied his or her constitutional civil rights by a local government will continue to have the full force of the Civil Rights Act of 1871 behind them. Section 1983 will continue to allow recovery when there has been an intentional or bad faith violation by the municipality or, in other words, when officials know or should have known that their conduct violated the constitutional norm. Similarly, under the legislation, a prevailing plaintiff, will still recover attorney's fees which will compensate his or her attorney at the prevailing market rate. No plaintiff need fear having to pay the other party's fees, even if he or she loses the case, as long as the claim is not frivolous or groundless.

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

STATEMENT OF

THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 2802
THE LEGAL FEES EQUITY ACT

Fred N. Fishman
Robert H. Kapp
Co-Chairmen
William L. Robinson

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

Daniel A. Rezneck
Timothy J. Lindon

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

September 21, 1984

I. INTRODUCTION

The Lawyers' Committee for Civil Rights Under Law (the "Committee") is a nonprofit organization established in 1963 at the request of the President of the United States to involve members of the bar throughout the country in the national effort to assure civil rights to all Americans. Throughout its history, the Committee has provided legal representation to persons seeking to vindicate civil and constitutional rights. The Committee provides this representation through its own staff attorneys and through cooperating private counsel acting on a voluntary basis. Both the quantity and the quality of the legal representation which can be provided by the Committee are directly affected by the standards that are applied to determine attorneys' fee awards in cases in which the parties whom they represent prevail.

The Committee submits the following testimony with respect to the Legal Fees Equity Act, S. 2802, which would severely limit the availability of fees and related costs in litigation against the federal government and state and local governments. Since the Committee's principal concern is the potentially devastating impact that S. 2802 would have on private enforcement of the nation's civil rights laws, our comments are limited to the effects of the proposed legislation on fee-shifting statutes which authorize district courts to award a reasonable attorneys' fee to prevailing civil rights litigants. Principal among these statutes is the Civil Rights Attorneys' Fees Act of 1976 (the "Fees Act"), 42 U.S.C. § 1988.

Congress has long recognized the importance of vigorous private enforcement of the civil rights laws and the essential role played by counsel fee provisions in permitting and encouraging the victims of discrimination to secure legal resources.[1] The resources available to governmental agencies to enforce the civil rights laws are extremely limited. Unless fee awards in private civil rights suits are adequate to attract competent counsel, the nation's civil rights statutes will provide only "paper," rather than real and enforceable rights to the victims of discrimination.

The fundamental purpose for the enactment of the Fees Act in 1976 was to assure that civil rights cases would carry themselves in the marketplace, rather than being dependent on the charitable impulses of individual lawyers or individual contributors to charitable or legal aid organizations. Accordingly, Congress mandated that fees be awarded in successful civil rights law suits at a rate which would make such litigation fully competitive in the marketplace with other litigation of equal complexity. As the Senate Report stated: "[i]t is intended that the amount of fees awarded under [the civil rights statutes] be governed by the same standards which prevail in equally complex Federal litigation, such as antitrust cases."[2]

---

[1] See, e.g., S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) ("S. Rep.") ("[The] civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.").

When S. 2802 is viewed in this context, it is clear that the proposed legislation would not "clarify" or "confirm" the standards for awards under the 1976 Fees Act. Rather, the legislation would dramatically change the Fees Act in a regressive manner.

As we discuss below, the Committee opposes S. 2802 because the unreasonably low level of fees permitted under the legislation would virtually assure that civil rights cases would no longer be economically competitive in the legal marketplace for private counsel. Moreover, by abandoning the traditional market-rate approach for awards to civil rights organizations, the legislation would have a chilling and potentially devastating impact on the ability of the Committee's staff attorneys to assist in enforcing the nation's civil rights laws.

---

[2] S. Rep. at 6.

The Committee believes that there is neither any need nor any justification for legislation further restricting the ability of attorneys who prevail in civil rights suits to recover reasonable attorneys' fees. The contention that civil rights actions result in a "windfall" for plaintiffs' counsel is contrary to the economic reality that, for most practitioners, a civil rights practice is, at best, economically marginal. Moreover, there is no justification for reducing the liability of governments for violations of the civil rights laws, and thus reducing an important deterrent to such violations. Governmental agencies have significant resources which vastly exceed those of civil rights organizations and should not be permitted to violate the civil rights of citizens at "discount rates."

II. IMPACTS OF S. 2802 ON ENFORCEMENT OF THE CIVIL RIGHTS STATUTES BY PRIVATE COUNSEL

We discuss below the effect of the key provisions of S. 2802 on private enforcement of the civil rights laws by private counsel. We believe that, both individually and in combination, these provisions would make it impossible to attract competent counsel to undertake complex civil rights litigation and could dry up private enforcement of the civil rights laws.

A. The $75 Per Hour Fee Cap

S. 2802 wo[illegible] inter alia, impose an absolute and inflexible $75 per hour cap on attorneys' fees under the Fees Act, regardless of the expertise or experience of counsel, or the geographic area in which he or she practices.[1] The $75 per hour cap bears no relation to the value of the services of a particular attorney in the legal marketplace and would, in many areas of the country, make it impossible to attract competent counsel to handle complex civil rights cases.

---

[1] The $75 per hour cap is presumably based on the rate currently allowed under the Equal Access to Justice Act. Inexplicitly, however, the proposed cap for civil rights litigation would be inflexible, while the Equal Access to Justice Act permits fees in excess of $75 to compensate for increases in the cost of living or other factors. 28 U.S.C. § 2412(d)(2)(A). The proposed new statute expressly exempts Equal Access cases from the absolute $75 cap, as well as from other limiting provisions.

Specifically, the $75 per hour cap would discourage vigorous enforcement of the civil rights laws by private counsel in at least two important respects.

First, in most jurisdictions $75 per hour is simply inadequate to attract competent counsel to undertake complex civil rights litigation. While $75 per hour may be sufficient in certain geographic areas, it certainly is far below the prevailing market rate for experienced counsel in major cities. The inflexible $75 cap does not account for geographic variations in the cost of living, inflation or the realities of the marketplace. Indeed, the federal government itself has sought and recovered fees significantly in excess of $75 per hour.[1] And, when the federal government has retained outside counsel, it has frequently paid rates more than double the proposed $75 per hour cap.[2]

---

[1] See, e.g., Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Commission, No. 83-2046 (August 27, 1984 D.C. Cir.) ($90 and $110 per hour).

[2] For example, Freedom of Information requests have revealed that Vedder, Price, Kaufman, Kramholz and Day was retained by the United States Postal Service to represent them in Fair Labor Standards Act litigation at hourly rates of up to $175 for partners and $100 for associates. Similarly, both the Federal Home Loan Bank Board and the Pension Benefit Guaranty Corporation pay up to $175 per hour for partners.

Moreover, state governments routinely seek and recover fees in excess of $75 per hour.[6] In light of these rates, it is, at best, disingenuous and one-sided for the government to argue for a $75 cap applicable only to plaintiffs' counsel.[7]

Second, even if $75 per hour is sufficient to induce some attorney to undertake civil rights suits, it certainly is not an adequate to attract the experienced and competent counsel vital to successful prosecution of complex civil rights actions. It is beyond dispute that certain civil rights actions are complex and share the characteristics of other forms of complex litigation, including protracted duration, intricate problems of statistical information and analysis, massive documentation and prolonged discovery. Congress recognized in enacting the Fees Act that this type of case cannot be adequately handled by inexperienced counsel and, through market-rate fee awards, sought to encourage skilled attorneys to handle complex civil rights cases. Thus, Congress mandated that fees in civil rights cases "be governed by the same standards which prevail in equally complex Federal litigation. . . ."[8]

---

[6] See, e.g., State of Arizona v. Maricopa County Medical Society, 578 F. Supp. 1262 (D. Ariz. 1984) (fees up to $140 per hour and adjustment of 1.4); In re Cement and Concrete Antitrust Litigation, 1980-81 CCH Trade Cas. ¶ 63,797 (D. Ariz. 1980) (fees up to $125 per hour plus adjustment of 2.85).

[7] The cap places plaintiffs' civil rights attorneys -- who would be limited to $75 per hour -- at a significant disadvantage in litigation against the government, since, under the proposed legislation, the government remains free to retain outside counsel with significant resources and expertise at any price.

One court, in a Title VII case, noted as follows the importance that adequate fee awards play in attracting counsel competent to handle complex civil rights litigation:

> "Litigation in this area often involves extraordinarily complex legal and factual issues that many attorneys would simply be unable to handle successfully. The important individual and societal issues at stake in such litigation may not be adequately protected unless attorneys possessing the requisite skills can be induced to take Title VII cases. Many able attorneys, no doubt, are willing to forego some financial rewards because of the psychic satisfaction of advancing a cause in which they believe. However, the enforcement of the rights guaranteed by Title VII cannot be entrusted to such altruistic motives. While awards of attorneys' fees should not be used as either an additional sanction against defendants or as a windfall for plaintiffs' lawyers, the awards must be sufficient to make such representation financially attractive to highly qualified attorneys."[9]

---

[8] S. Rep. at 6.

[9] Lockheed Minority v. Lockheed M.&S. Co., 406 F. Supp. 828, 830 (N.D. Cal. 1976). (Emphasis added.)

Unless fee awards in civil rights cases are adequate to attract experienced counsel, these cases will be viewed as "second-class" litigation, or, alternately as a training ground reserved solely for inexperienced attorneys.

B. Elimination of Adjustments

The proposed elimination of the district court's discretion to adjust the lodestar rate would further assure that civil rights litigation would not be competitive in the marketplace. It is important to recognize that these lodestar adjustments are not "bonuses" or "rewards" in excess of an attorney's deserved compensation. Nor do they compensate attorneys for cases in which they do not prevail. Rather, as courts have recognized, they are an "attempt to calculate more precisely the market value of those services provided by an attorney."[18]

The hourly rates used by district courts to calculate the lodestar are those charged by lawyers in a community who are promised payment of their fees on a timely basis, regardless of whether they ultimately prevail. They are not the market rates for a contingent case. As would be expected, lawyers in the marketplace charge more for cases in which their compensation depends upon success than in non-contingent cases where fees are billed and collected on a regular basis. This is particularly relevant in complex civil rights litigation, where the risks assumed may be enormous; *e.g.*, the out-of-pocket expenses incurred by plaintiffs' counsel may run into the tens or hundreds of thousands of dollars and counsel may be required to wait many years before obtaining a cent in compensation. An adjustment may be necessary to assure that the compensation is at the market rate and accounts for factors such as the risk of no compensation, the loss of other paid work because of time spent on the civil rights claim and the decreased value of the money because of inflation.

---

[18] Alabama Power Co. v. Gorsuch, 672 F.2d 1, 6 n.28 (D.C. Cir. 1982).

Many lawyers have indicated that their effective hourly rate for a contingent case must be at least twice as high as a guaranteed payment hourly rate to make it feasible to take a contingent case. For example, Jerome Falk, of Howard, Rice, Nemerovski, Canady, Robertson & Falk, in San Francisco, has described how his firm evaluates a proposed contingent case:

> "When asked to handle a case on a contingent fee basis, we regularly attempt

> to make evaluation of the prospects for a recovery and the amount of that recovery. Because of the substantial risk of contingent fee litigation, and because such fees are not paid until the completion of the litigation (which, these days, may mean five years or more), a rule of thumb which we follow is that the anticipated fee, if successful, should be at least twice the value of the projected time to be expended at our regular hourly rates. If the projected fee does not meet this standard, we would ordinarily decline to handle such a matter. In my judgment, such a formula does not produce undue or excessive compensation for attorneys." (Emphasis in original.)[11]

Likewise, Fletcher Farrington, of Savannah, testifying before Congress recently in opposition to another bill which would have eliminated the consideration of contingency in setting court-awarded fees in civil rights cases, made it clear that his ability to continue taking these contingent cases is based on the possibility that he may at some point recover a reasonable fee.

> "[T]he 1976 amendment to § 1988 has had no effect on the number of cases filed under § 1983. As my summary demonstrates, these cases remain at the very low end of economic desirability. If they were desirable, other lawyers would not refer them to me but would try them themselves. Ninety percent of my cases come on referrals from other lawyers. In eleven years, I have devoted approximately 2400 hours of litigating "pure" § 193 [§ 1983] cases. To date,

---

[11] Declaration of Jerome B. Falk, Jr. 2 (January 31, 1980), filed in Westerlund v. Firemen's Fund Ins. Co., 24 FEP Cas. 1190 (N.D. Cal. 1980).

> I have recorded a total of $25,000 in attorney's fees, on verdicts totalling $174,000. On cases tried since the 1976 amendments to § 1988, I have obtained verdicts totalling $134,000, and have received fees of $24,000. No nonprofit civil rights organization has supported any of these cases. While my rate of return -- $10.00 per hour -- may improve, depending on the decisions in three cases that are now pending before trial and appellate courts, it will never improve to the point where I earn as much as the lawyers on the other side. The only case I have ever taken because of the prospect of adequate compensation is the one in which I am defending the City of Sylvania, for which I am paid on an hourly basis as the work is done. The 1976 Attorneys' Fees Act has not produced a "windfall" for attorneys regularly engaged in civil rights practice."

* * *

> "Absent contingency or multiplier adjustments, this amendment will end my civil rights practice on behalf of plaintiffs."[12]

In sum, if the district court is stripped of its discretion to adjust the hourly rate to account for risk and other factors, a civil rights practice will not be economic in the marketplace. Even if $75 per hour were sufficient to attract competent counsel in cases where payment of fees is assured in a timely fashion, it would not be sufficient to induce counsel to undertake a contingent case with massive risks and no guarantee of any payment.[13]

---

[12] Hearing on S. 585, A Bill to Provide a Special Defense to the Liability of Political Subdivisions of States Under Section 1979 of the Revised Statutes (42 U.S.C.§ 1983) Relating to Civil Actions for the Deprivation of Rights, and on Amendments to be Proposed by Senator Orrin G. Hatch, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 49, 54 (March 1, 1981). (Emphasis added.)

C. "Overhead" and "Related" Expenses

In addition, the definition of "overhead expenses" in Section 3(3) of the proposed legislation would discourage attorneys from undertaking civil rights actions. For example, the Act includes in the definition of "overhead expenses" -- for which [illegible] private attorney *cannot* recover separate from his or her hourly rate -- secretarial and other clerical and librarian time. However, in the legal marketplace, these expenses are often routinely billed to fee-paying clients. Indeed, a survey of District of Columbia firms establishes that 80 percent of D.C. firms bill clients for secretarial

---

[13] To the extent that Congress is concerned about a purported lack of standards governing the district court's discretion in adjusting the lodestar rate, we note that the Supreme Court recently set specific standards with respect to adjustments for the quality of representation in *Blum* v. *Stenson*, 104 S. Ct. 1541 (1984). In light of these standards, it simply is not necessary for Congress to enact new legislation to "clarify" the scope of the district court's discretion.

BEST AVAILABLE COPY

overtime.[14] If attorneys in civil rights cases are unable to recover litigation expenses which are routinely billed to fee-paying clients, they will be further deterred from taking on these cases.

D. Awards to Prevailing Parties

The proposed legislation would also unduly restrict the definition of prevailing party and allow recovery only for work performed on successful claims. These provisions would further the view that civil rights litigation is second class litigation, which cannot hold its own in the marketplace and thereby discourage vigorous litigation of civil rights claims.

As the analysis accompanying Section 3 of S. 2802 recognizes, the Supreme Court in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), established strict, yet workable, standards for defining a "prevailing party" for the purposes of awarding attorneys' fees. Under this test, "plaintiffs may be considered prevailing parties for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the

---

[14] Association of Legal Administrators, Capital Chapter, Washington, D.C., Personnel Survey 40-44 (Sept. 1, 1982).

BEST AVAILABLE COPY

suit."[15] The bill would add an additional and unnecessary requirement -- that the plaintiff obtain "significant relief" -- because the language in Hensley is allegedly "subject to misreading."[16]

There is no basis for this conclusion. The sole case cited in the section-by-section analysis is Laffey v. Northwest Airlines, Inc.,[17] where, allegedly, "the district court found that the plaintiffs to be prevailing parties for all purposes even though they in fact failed to achieve the results sought in important respects."[18] This statement is simply wrong. The original complaint in Laffey contained fourteen charges of violation -- ten under Title VII and four under the Equal Pay Act. A violation was found as to every one. Moreover, the plaintiffs also prevailed on virtually every remedy they sought during the course of the litigation, winning over $50 million and far-reaching injunctive relief for the class.[19] In sum, neither Laffey nor any other case supports the conclusion that the Hensley formulation is in need of clarification or modification.

---

[15] Id, at 1939.

[16] 130 Cong. Rec. 8502 (June 27, 1984).

[17] 572 F. Supp. 354 (D.D.C. 1983).

[18] 130 Cong. Rec. 8502 (June 27, 1984).

[19] The magnitude of the plaintiffs' victory in Laffey is demonstrated by the fact that in fiscal year 1981 the Equal Employment Opportunity Commission reported a total recovery in all of its litigated discrimination cases of approximately $16 million. 16th Annual Report, EEOC, FY 1981, at 28.

Moreover, the requirement that courts arbitrarily dissect lawsuits to segregate out from the fee award each and every issue on which a party did not prevail is contrary to the goal of effective enforcement of the civil rights laws in at least four respects.

First, this limitation would further restrict the ability of civil rights suits to compete in the marketplace. As the Sixth Circuit has explained: "We know of no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.'"[20]

Second, reduction of the fee award to exclude all matters on which a successful plaintiff did not prevail could have a chilling effect on the vigorous litigation of those civil rights cases which are brought. Attorneys would be forced to spend time only on issues which they are relatively certain they can succeed on from the start. Thus, a narrow view of compensable hours may discourage civil rights attorneys from vigorous and innovative lawyering on behalf of their clients.

---

[20] Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

Third, the proposed limitation may conflict with an attorney's obligation under the Code of Professional Responsibility to represent a "client zealously within the bounds of the law . . . ." Model Code of Professional Responsibility, Canon 7 (1981). The American Bar Association argued strenuously in a recent amicus brief before the Supreme Court that a narrow construction of compensable hours could discourage compliance by attorneys with these ethical obligations.

> "Under petitioner's narrow construction of [compensable hours], the attorney who zealously on behalf of a client presents novel theories for relief and prevails on less than all issues presented would be penalized for acting in conformity with the Code of Professional Responsibility even if the relief gained was substantially what the client set out to accomplish. The attorney's right to compensation should not depend on the success or failure of every claim presented. Such a position could lead an attorney to refrain from -- or at least consider refraining from -- presenting supportable theories or issues which are novel."[21]

Finally, from a practical viewpoint, a narrow view of compensable hours may increase the administrative burden on courts since it is difficult to divide time into precise issue parcels. This is particularly true in complex litigation, where time spent drafting a motion or preparing for a deposition may relate to multiple issues.

---

[21] Brief of American Bar Association as Amicus Curiae 12-13 in Hensley. (Emphasis added.)

In combination, the provisions of S. 2802 virtually assure that the goal of obtaining competent private counsel to enforce the civil rights laws will not be achieved. Counsel would be expected to take on these cases on a contingent basis below the rates prevailing in the marketplace when timely payment is assured, and, with the further knowledge that, even if they are successful, their time may be arbitrarily dissected to exclude any issues on which they do not prevail. Thus, S. 2802 severely undermines the goal of the Fees Act and other civil rights fee-shifting statutes -- to make civil rights cases competitive in the legal marketplace.

III. IMPACT OF S. 2802 ON ENFORCEMENT OF CIVIL RIGHTS STATUTES BY CIVIL RIGHTS ORGANIZATIONS

Section 6(d)(3) of S. 2802 would permit a district court to reduce the amount of attorneys' fees otherwise authorized to be awarded if the award "unreasonably exceeds the hourly salary of the attorney representing the party." This provision represents a dramatic reversal of existing law, under which attorneys for civil rights organizations are awarded market rates as a matter of course. See Blum v. Stenson, 104 S. Ct. 1514, 1545-47 (1984).

In addition to reducing the work of attorneys for civil rights organizations to second-class status, this provision is vague and unworkable. It gives to the district court almost unlimited discretion to reduce or deny fees, even if the civil rights organization prevailed on all issues and obtained significant relief. Moreover, the determination of the "hourly salary" of a staff attorney and its relation to overhead expenses would unnecessarily involve the federal courts, as well as civil rights organizations, in lengthy and complex proceedings to determine fee awards.

Awarding full market-value fees to civil rights organizations is necessary to fulfill the Congressional purpose of encouraging private civil rights enforcement in at least two important respects.

First, full fee compensation to civil rights organizations deters both unlawful behavior and also imprudent litigation tactics by defendants. As summarized by the United States Court of Appeals for District of Columbia Circuit in a Title VII case:

> "[T]o compute fees differently depending on the identity of the successful plaintiff's attorney might result in two kinds of windfalls to defendants. The incentive to employers not to discriminate is reduced if diminished fee awards are assessed when discrimination is established. Moreover, . . . the defendant will be subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation."[22]

Moreover, the payment of market rate fees to civil rights organizations involves no unfairness to the government since the identity and the fee arrangements of the plaintiffs' attorneys are totally fortuitous. As one commentator has noted:

> "It would, however, be fundamentally unfair to award fees based upon full market rates to attorneys who ordinarily seek to maximize their economic return -- a result which is essential to enlist their services based upon economic self-interest -- while at the same time awarding something less than full market value to attorneys who forego some of their earning capacity by representing clients who cannot afford adequate representation. To do so is to penalize those attorneys for their public spiritedness."[23]

---

[22] Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc).

[23] Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 323 (1977). (Emphasis added.) For example, it would be unfair and unreasonable to compensate two attorneys with identical levels of experience and expertise who serve as co-counsel

[Footnote continued on following page]

Second, full fee compensation for civil rights organizations correlates with the Congressional purpose of vigorous enforcement of the civil rights laws since such fees go directly to further civil rights litigation. The receipt of full fee awards by civil rights organizations promotes their continued existence and service to the public in enforcing the civil rights laws. The shrinking number of private lawyers willing to handle complex civil rights cases and the federal government's limited enforcement activities in many areas have multiplied the burdens on civil rights organizations. Lowering their fees, and thus diminishing their capacity now would simply multiply the difficulty that civil rights clients already have in finding adequate representation for meritorious claims, and would thus further defeat Congress' goal in securing vigorous enforcement of the civil rights acts.[24]

[Footnote 23 continued from preceding page]
on the same civil rights case at different rates simply because one attorney chooses to work for a private law firm while the other attorney chooses to work for a civil rights organization such as the Committee. Yet, this result could be required under the proposed legislation.

[24] The Committee also opposes Section 6(c) of the proposed legislation, which would require a court to reduce any monetary judgment up to 25 percent by the amount of attorneys' fees awarded. Thus, in a Title VII individual or class action suit with a large monetary

[Footnote continued on following page]

IV. CONCLUSION

The need for adequate attorneys' fees to attract competent attorneys to bring civil rights actions is even greater today than in 1976 when Congress enacted the Fees Act. Federal funds dedicated to enforcement of the civil rights laws are increasingly limited, and, in many cases, these limited funds are now being used by the Civil Rights Division of the Department of Justice to support the position of employers, rather than employees. For example, in recent terms of the Supreme Court, the government has filed amicus briefs on the side of employers dealing with such important questions as the scope of class actions, defenses to claims that

---

[Footnote 24 continued from preceding page] recovery for back pay, the entire fee could come out of the award to the prevailing plaintiff, rather than from the defendant. This provision could significantly reduce the back pay available to prevailing plaintiffs and undermine the back pay provisions of the civil rights laws, which are designed "to make the victims of discrimination whole." Albemarle Paper Co. v. Moody, 422 U.S. 404 (1975). In addition, this provision unfairly disfavors civil rights plaintiffs and provides a windfall to the defendant in such cases. For example, in private antitrust cases, a defendant found to have violated the statute is liable for treble damages, plus reasonable attorneys' fees. The attorneys' fee award does not come out of the plaintiff's damage award. It is unfair to single out for less favorable treatment civil rights plaintiffs who have been discriminated against by the government.

tests and other devices unlawfully exclude blacks from employment, and the legitimacy of affirmative action remedies for employment discrimination. The increased burden on private parties to enforce the civil rights laws cannot be met solely by privately funded organizations such as the Committee or by the pro bono efforts of individual attorneys. Adequate fees are necessary to make civil rights cases attractive to private attorneys in the marketplace.

It is clear that the purpose of S. 2802 is not to "clarify" the standards for the award of attorneys' fees, nor, despite the bill's misleading title, is it intended to bring "equity" to the award of these fees. Instead, this legislation would, for the most part, assure that civil rights cases against the government would be an unwanted stepchild in the marketplace for legal services. Whatever benefit to government coffers which may result from the proposed legislation would be achieved at great cost to the individual victims of discrimination who would be unable to effectively pursue meritorious claims. Accordingly, the Committee believes that enactment of S. 2802 would seriously undermine the important laws which protect the civil and constitutional rights of all citizens.

ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Roy O. Gulley
Director
Supreme Court Building
Springfield 62706

30 North Michigan Avenue
Chicago 60602

July 27, 1984

Honorable John P. Shonkwiler
Circuit Judge, 6th Judicial Circuit
306 Piatt County Courthouse
Monticello, IL 61856

Dear Judge Shonkwiler:

I have your letter of July 20 concerning the effects of the doctrine of judicial immunity on the work of the judges of the State of Illinois.

I think this problem is to be separated into two categories. I do not detect much concern on the part of judges about their decision making process and the possibility of being sued for having rendered a bad decision, whether it results from a wrong interpretation of the law or their deciding that one sides witnesses are telling a more truthful story than the other sides witnesses. The area in which the erosion of the doctrine has had a tremendous effect is in connection with the administrative duties that judges must perform in their day-to-day activities. The problem is especially acute in connection with the judges who are serving in a supervisory capacity such as our Chief Judges in Illinois, and the Presiding Judges in many of the counties. These judges are called upon in a routine manner to make administrative decisions conerning official court reporters, probation officers, bailiffs, and employees of the clerks of the courts.

Most of the lawsuits that are being generated against judges, at least in Illinois, arise out of hiring and firing decisions made by judges in their administrative capacity with respect to probation officers and other non-judicial court personnel.

The interest that Illinois Judges are displaying in the availability of insurance to protect them in title 1983 suits is indicative of the fear they have they they may become defendants in legal actions. I would hope that legislation of the nature suggested in the amendment to title 1983 which you sent me will be given thoughtful consideration by the Congress of the United States.

I can foresee the time when judges will refuse to accept the responsibility of being Chief Judges, Assignment Judges, or Presiding Judges in the various counties of our state.

Very truly yours,

Roy O. Gulley

Director

ROG:nk

Circuit Court of Cook County

Chambers of
Harry G. Comerford
Chief Judge

Richard J. Daley Center
Chicago, Illinois 60602

August 9, 1984

Honorable John P. Shonkwiler
Circuit Judge
Circuit Court of Illinois
Sixth Judicial Circuit
Piatt County
306 Piatt County Courthouse
Monticello, Illinois 61856-1695

Dear Judge Shonkwiler:

I would like to take this opportunity to share with you the concerns of the judges of the Circuit Court of Cook County regarding the continuing erosion of judicial immunity in actions based upon 42 USC 1983 and 1988.

As you are aware, the United States Supreme Court opinion in the case of Pulliam vs. Allan has created some special problems for judges in Illinois. These problems are particularly acute in the areas of traffic, overweight truck cases, and repeated Municipal Ordinance violations. While this can be dismissed as a legislative or executive branch problem, the judges in Cook County, as well as in other parts of Illinois, are faced with the dilemma of following state law, or, in the alternative, following the reasoning in the Pulliam decision.

Our judges are concerned that unless this dilemma is resolved, the administration of justice in the State of Illinois will be seriously hampered. Because of the chilling effect of the present statutes and court decisions interpreting them, it is felt that this dilemma is best resolved by legislation amending the Federal statutes. We, therefore, support the proposed amendments to Sections 1983 and 1988 of the Federal Civil Rights Act which you have previously forwarded to me.

Very truly yours,

Harry G. Comerford
Harry G. Comerford
Chief Judge
Circuit Court of Cook County

Circuit Court of Cook County
Second Municipal District

Harold W. Sullivan
Presiding Judge

5600 Old Orchard Road
Skokie, Illinois 60077
Telephone: 470-7200

August 23, 1984

Honorable John P. Shonkwiler
307 Piatt County Courthouse
Monticello, Illinois 61856-1695

Re: Affects of Pulliam v. Allen
on the judicial process

Dear John:

The idea that judges might be sued personally under the Civil Rights Act certainly was never contemplated in Congress at the time that legislation was passed. Once the Pulliam case arose, it was easy to forecast the deleterious effects that such a political theory would have on the judicial process. The American Bar Association did file an amicus brief in the United States Supreme Court opposing the concept that judges could be held personally liable for their good faith decisions. Traditionally, the remedy for an improper decision by a court is to appeal. For a judge to be reversed by a higher court is one thing, but for him to be subject to personal liability is quite another because it forces a judge to consider the possibility of personal liability rather than the equities of the case before him in making decisions or drawing procedures.

As the presiding judge of a municipal district, I am in the real world of the fallout from Pulliam v. Allen. There are 400,000 people and 21 police agencies in this area that turn to me for a decision as to the proper procedures on the issuance and service of warrants. The Pulliam case has caused bedlam among these agencies. For example, the question of whether a police department may serve a warrant for a non-jailable offense is on the minds of all these departments and agencies. It is one thing to issue a warrant to initiate a prosecution under a non-jailable city ordinance and quite another thing to decide whether it's appropriate to issue a warrant for a defendant who failed to appear when given a ticket for a non-jailable offense.

In Illinois, there is a procedure whereby anyone stopped for a minor traffic violation may merely sign a promise to appear and he need not be further detained. That program is now up in the air because many judges interpret the Pulliam case as prohibiting follow-up on those cases by the issuance of an arrest warrant. The same reasoning applies to scofflaws who continue to ignore parking regulations and accumulate great numbers of tickets. These people now thumb their noses at the court system. The same reasoning applies to many minor, but very

Honorable John P. Shonkwiler
Page Two
August 23, 1984

necessary, housekeeping ordinances that require appropriate sanitation in the municipalities. The list goes on and on. Every time I turn around, there seems to be another instance in which Pulliam has thrown a monkey wrench into a reasonable system for maintaining the public health or public order.

The problem is that a judge can no longer approach these problems like a judge -- he must do it as though he were a potential defendant with possible personal liability. When the judge is in that position, he must decide all those unanswered issues on the side of protecting his own financial stability. The fact that judges might be able to cover this liability with personal insurance is no answer at all, as a matter of fact it exacerbates the situation. The very existence of such insurance or indemnity statutes by state governments are the catalyst for the creation of a deep pocket that will encourage large numbers of law suits in this area.

How about a judge who is asked to sign a search warrant in a close case? That is a very technical field of law and one that has been changing quite rapidly. If a judge were to issue an improper search warrant, he would be violating the constitutional rights of a defendant and, therefore, open to personal liability under a Civil Rights suit. It is simply bad public policy to form and shape the political processes of the community by way of civil law suits against the judiciary.

The ABA is on the way to recognizing the falacy of this position. On last August 4th, the National Conference of State Trial Judges unanimously passed a resolution opposing the political theory that flows from the Pulliam case and suggesting that the Civil Rights Act be modified. A copy of that resolution is attached hereto.

I wish to thank you for your interest and work in this area and hope that these comments may be of some help.

Sincerely,

H. W. Sullivan

Harold W. Sullivan,
Presiding Judge
Second Municipal District

HWS:mm

RESOLUTION OF NATIONAL CONFERENCE OF STATE TRIAL JUDGES OF THE ABA

WHEREAS, on May 14, 1984, the United States Supreme Court rendered its decision in Pulliam v. Allen, No 82-1432, and therein held that judicial immunity does not bar the personal liability of judges for attorney fees under 42 USC 1988, and

WHEREAS, personal liability for attorney fees cannot meaningfully be distinguished from damages liability in its threat to judicial independence and impartiality, and

WHEREAS, Pulliam represents a significant departure from the common laws long standing protection of judges from personal financial liability for conduct in their judicial capacity, and

WHEREAS, the legislative history of 42 USC 1988 reveals no congressional interest to abrogate the common law immunity of judges, and

WHEREAS, the availability of attorney fees can serve only to encourage vexatious and unfounded actions against judges, and

WHEREAS, the burdens and risks of defending such actions in and of itself constitutes an unacceptable threat to judicial independence and impartiality, and

WHEREAS, Pulliam is one of a series of recent decisions by the Court signifying an accelerating erosion of the protections afforded judges by the doctrine of judicial immunity, and

WHEREAS, it is of crucial importance to the public to preserve the impartiality and independence of its judges and to relieve them of burdens of defending vexatious and groundless actions.

THEREFORE, BE IT RESOLVED that 42 USC 1988 be amended to exclude from its provisions members of state judiciaries acting in their judicial capacity.

CIRCUIT COURT OF ILLINOIS
20TH JUDICIAL CIRCUIT

JOSEPH F. CUNNINGHAM
CHIEF JUDGE

COURTHOUSE
BELLEVILLE, 62220

August 3, 1984

Honorable John P. Shonkwiler
Judge of the Circuit Court
306 Piatt County Courthouse
Monticello, Illinois 61856

Dear John:

Thank you for your letter and I apologize for the delay in replying.

The recent decision in Pulliam vs. Allan raises some specific problems for Administrative Judges and, in particular, for Chief Judges, who have the responsibility of the administration of their circuit. There are several statutes in the State of Illinois that impose some specific duties on the Chief Judge or on a Resident Judge, in particular, Ch. 46 Sec 6-21 and Sec 6-70 of Illinois Revised Statutes. Another example would be the court's duty under Ch. 25 Sec 22, inspection of the Circuit Clerk's Office.

Some of the Administrative duties that a Chief Judge or Presiding Judge has to make on a day to day basis involves, at times, emotional disputes, and a Judge acting in an administrative capacity should be able to resolve these matters without fear of reprisal.

While we all strive to put together competent and caring staffs, the possibility of being sued or challenged, on even an administrative decision by a staff member, is very real.

Attached hereto find a list which I prepared sometime ago that a Presiding and/or Chief Judge should be aware of.

As always, it was good to hear from you and I hope this will be of some benefit to you, if not, let me know.

Very truly yours,

JOSEPH F. CUNNINGHAM

JFC:b
enc

1. Constitution:

    Article 6 Sec 7 (b, c)

2. Supreme Court Rules: (Ch. - 110A)

    Sec 21 - General Adm. Orders

    Sec 42 - Conference of Chief Judges

3. Supreme Court Rule: (Ch. - 110A)

    Sec 295 - Assignment of Associate Judges to Criminal Cases

4. Circuit Clerk:

    Ch. 25 Sec 22 - Inspection

5. Detention Home:

    Ch. 23 Sec 2683 and 2684

6. Public Defender:

    Ch. 34 Sec 5602 and 5608

7. Drainage:

    Ch. 42 Sec 272.1 and 273

8. Marriage Fund:

    Ch. 110A Sec 40

9. Probation: (Court Services)

    Ch. 37 Sec 706-3, 706-5
    Ch. 38 Sec 204-1 et sequi

10. County Jail: (Ch. 75 Sec 28)

    Circuit Court to inquire into conditions. (Repealed 7/1/84)

11. Special Prosecutor:

    Ch. 14 Sec 6

    Ch. 38 Sec 13-4 (c) Civil Rights (Repealed 7/1/80)

12. Court Reporters:

    Ch. 37 Sec 653, 654 appointment

    Ch. 38 Sec 112-6 Grand Jury

13. Dept of Correction:

14. Election Board:

    (1) City - Ch. 46, Sec 6-21, 6-22, 6-24, 6-25, 6-70 (last para)
    (2) Electoral Board - Ch. 46 Sec 10-9, 10-10, 10-10.1, 10-12

15. Jury Commission:

    Ch. 78 Sec 24

16. County Law Libraries:

    Ch. 81 Sec 81

17. Retirement - Judge

    Ch. 37 Sec 23.71 - Automatic Retirement
    (Supreme Court Order # (6/23/76)

18. Declaration of Economic Interest:

    Ch. 110A Sec 68

19. Administrative Assistant to Chief Judge:

    Ch. 37 Sec 72.4-1

20. Appointment of Associate Judges:

    Ch. 110A Sec 39

21. Mental Health:

22. Emergency Court - "Mass Arrest"

Chief Judge:

23. Certification jurors, number required - Ch. 78 Sec 32

24. Duties concerning detention home - Ch. 23 Sec 2684

CIRCUIT COURT OF ILLINOIS
FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY COURTHOUSE
PARIS ILLINOIS 61944

RALPH S. PEARMAN
CHIEF JUDGE

TEL. 217-463-4805

July 18, 1984

Hon. John P. Shonkwiler
Circuit Judge
306 Piatt County Courthouse
Monticello, IL 61856-1695

In re: Possible Amendment to
42 U.S.C. 1983 and 1988.

Dear John:

Under the present judicial system in our state, we have Chief Judges of Circuits and Presiding Judges of Counties or Divisions who are charged with administrative responsibilities by the statutes or Supreme Court Rules, but are beyond the normal judicial function of hearing and deciding cases. These responsibilities include the appointment of Associate Judges, Court Reporters, Public Defenders, Probation Officers, and Jury Commissioners. For the performance of these administrative duties we receive no additional compensation, and now pursuant to the Pulliam case and others, it would appear that we have no immunity from damage suits while performing these required acts.

In our Circuit, which is relatively small geographically, we are required to fill by appointment over 50 positions. While as of this date we have not incurred any suits with respect to the making of appointments, it is not difficult to envision a suit being filed by some disappointed applicant who claims to have been denied the position because of his race, religion, ethnic background, sexual proclivity, or whatever reason. We are similarly charged with the unpleasant task of discharging people from these same positions. This has already resulted in our being subject to suit.

At the present time there is a suit in Federal Court against three of our Circuit Judges who were appointed by me as Chief Judge to conduct a hearing with respect to an Assistant Probation Officer, which ultimately resulted in the discharge of this individual. This suit has been pending for over a year, and a Motion for Summary Judgment based upon judicial immunity has been denied. In addition to the potential liability with respect to the charges, the judicial system is deprived of "judge time" by the days spent taking depositions, attending hearings and preparing for trial. While the judges involved in this case are being furnished representation by the Attorney General, they have been advised that they may wish to employ additional counsel at their own expense because of potential personal liability. Needless to say all Judges are reticent to accept an assignment of this nature because of the potential exposure to a claim being filed.

In this particular case counsel for the Plaintiff has now stated that he is considering adding me as a Defendant for issuing the order appointing the other Judges to hear the case, and also Roy Gulley, as Court Administrator, for advising and conferring with me as to procedure to be followed in the original appointment.

We also have another situation in which an Associate Judge had submitted his resignation, and we were preparing to fill the vacancy pursuant to Supreme Court Rule, when he attempted to withdraw his resignation but was advised that once received the resignation could not be withdrawn; we proceeded to fill his vacancy and remove his name from the payroll. While no suit has been filed as of this date, he has conferred with various attorneys, and he is seeking representation for the filing of a suit.

This particular problem of decreasing judicial immunity has been on the agenda and discussed frequently at our Conference of Chief Circuit Judges of the State of Illinois. It is apparent that it is a concern in every Circuit and to every Judge as to the pattern of lessening immunity under these Acts and their interpretation by the federal court system. We would strongly urge that the proposed amendments be introduced and passed at the earliest opportunity.

Very truly yours,

Ralph S. Pearman

Chief Judge
Fifth Judicial Circuit

RSP:se

SCHWARZ. SELF. WHITE. EMONS & McDONALD
ATTORNEYS AT LAW
105 N. STATE STREET
P.O. BOX 189
JERSEYVILLE. ILLINOIS 62052-0189
(618) 498-5588

HOWARD LEE WHITE
CLIFFORD C. EMONS
MICHAEL J. McDONALD

GEORGE RUSSELL SCHWARZ. OF COUNSEL
JOHN SPENCER SELF (1921-1978)

August 23, 1984

Honorable John P. Shonkwiler
Circuit Judge
306 Piatt County Courthouse
Monticello, Illinois 61856

Dear Judge Shonkwiler:

I have been asked for my views on possible legislation in Congress exempting the state judiciary from the provisions of 42 U.S.C. 1983 and 1988.

As you know I was a defendant in a 1983 action because I discharged a female probation officer. From the case's beginning before the Equal Opportunity Employment Commission until it was finally resolved in the Federal District Court took more than three years.

The probation officer was fired on September 30, 1980, complaint was filed with the E.O.E.C., a letter to sue was issued, complaint was filed and finally the case was tried in January of 1984. Plaintiff was awarded a judgment in the sum of $81,818.00. This judgment was set aside in April, 1984 and summary judgment granted. The case is now on appeal.

You can imagine the amount of time that I had to take from my judicial and administrative duties because of this case. If I had it to do over I doubt if I would have taken the action I took because of the time involved.

I am of the opinion if the trend continues as it has, judicial immunity will be a thing of the past. The practical effect is going to be that State Judges will not make any administrative decisions. In counties such as Piatt, Jersey and several other one judge counties in Illinois the effect will be readily seen. Why should a judge make an administrative decision if he leaves himself open for a 1983 action?

I am sure you are familiar with the case involving Bill Sunderman in Charleston. As I understand it he was assigned by the Chief Judge of this circuit along with two other judges to conduct an administrative hearing involving a probation officer and was sued under 1983. I am sure there are other cases you are familiar with.

I have been told that a Supreme Court Justice in Illinois has been sued under 1983 for an opinion he wrote. The Justice is going to have to take time away from his judicial duties to cooperate in the defense.

If the present trend continues, Judges are going to be spending more time "defending" than "deciding".

The ever present threat of a 1983 action has certainly had an effect upon my attitude as a judge. If judges are going to be sued for discharging administrative responsibilities as well as judicial then you might as well close shop.

As you know, I retired on August 6, 1984 after 22 years of service on the bench. I assure you that one of the considerations that led to my retirement was the experience under the 1983 action.

I endorse the exemptions you forwarded and commend you for your efforts on behalf of the judiciary. If I can be of further assistance, please call.

Kindest personal regards.

Yours truly,

Schwarz, Self, White, Emons &
McDonald

By Howard Lee White
Howard Lee White

MLW/mpf

STATE OF ILLINOIS
CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

CHAMBERS OF
WILLIAM J. SUNDERMAN
COURTHOUSE
CHARLESTON, ILLINOIS 61920
TEL. 345-0542

August 22, 1984

Honorable John P. Shonkwiler
Circuit Judge, Sixth Judicial District
306 Piatte, County Courthouse
Monticello, IL 61856

Dear John:

Some time ago you wrote to Judge Pearman asking him for a letter which would point out some of the difficulties we have encountered in our circuit relative to a civil rights action filed by a discharged member of our probation staff. Judge Pearman has asked me to respond to your letter since I am one of the defendants in the matter and have a greater acquaintance with its details. I hope you will excuse the delay in response since I have been on vacation and have been tied up in jury work.

I am sure you are familiar with the background of the civil rights cases about which the judges are concerned. Recent legislation by Congress has given anyone a cause of action against any person who deprives them of their civil rights and provides for punitive damages as well as compensatory and also attorney fees. The recent Pulliam case to which you referred in your letter to Judge Pearman is one example of the problems the judges have in connection with these matters. The Pulliam case did not allow damages, but it did give the plaintiff an award of attorney's fees to be paid by the Defendants. The judges consider this merely a damage award by another name. One of the problems in connection with these cases is the fact that due process has never been satisfactorily defined nor is there any substantial agreement on the identity of the rights referred to as "civil rights". In the matter in which our judges are directly concerned, the plaintiff claims that his job is a property right protected by the Constitution.

In a federal case in Indiana the Court held that there is no property right in a public job and that public employees are not entitled to the same protection which the Constitution would afford a person in private employment. Whether this case will be adopted in our Federal District is not known. I was recently disappointed when Judge Baker in our district denied a motion to dismiss on the groundsof judicial immunity; so there is some question in my mind as to whether he will adopt the Indiana view.

August 22, 1984

At the present time our attorney general is preparing a motion for summary judgment which will suggest a number of defenses. One defense will be on the grounds that the probation office is such an integral part of the court that the court must be afforded judicial immunity in dealing with personnel problems in the probation office in order that the judicial function of the court may not be seriously impeded. I think the Attorney General will also again raise the question of judicial immunity on the ground that the operation of the probation office and the discharge of its personnel is a judicial function rather than an administrative one and is entitled to judicial immunity.

The plaintiff's position is because of the fact that he has been deprived of a property right without due process, he was entitled to a hearing, he was entitled to ask for the recusal of the judges involved and the designation of other judges to hear the matter, he was entitled to call the judges involved as witnesses, and he was entitled to a jury trial. These are all matters which are being strenuously resisted by the defenses and may be resolved when the motion for summary judgment is decided. I should point out that the discharge of the plaintiff in this matter was made under the provisions of the Illinois Criminal Code relating to discharge of members of the probation staff. I need not tell you that Judge Spitz, Judge Komada, and myself meticulously observed the provisions of the statute. The statute, however, was written a number of years ago and, I am sure, was written by those who were under the impression that the discharge of a member of the staff was strictly a judicial act well within the province of the judges and not subject to question. We did not afford the plaintiff a hearing as he demands because we felt that the statute did not require it. The statute provided that the judges may hear evidence in connection with their investigation of the matter. And this we did.

I can furnish further details of the origins and pertinent facts of the discharge of the individual involved in our litigation. I am not sure they would be helpful to you. But if you want a full history of the matter along with any other information that I may have, I would be happy to furnish it. This letter has only touched the high points of this situation and it is quite possible that if our association takes some action additional information will be required. Please let me know your wishes in the matter.

Best regards.

Yours very truly,

William J. Sunderman
Circuit Judge

WJS:jas

CIRCUIT COURT OF ILLINOIS
SIXTH JUDICIAL CIRCUIT
PIATT COUNTY

CHAMBERS OF
JOHN P. SHONKWILER
CIRCUIT JUDGE

306 PIATT COUNTY COURTHOUSE
MONTICELLO, ILLINOIS 61856-1695

TELEPHONE (217) 762-5861

September 12, 1984

The Honorable Orrin G. Hatch,
United State's Senate
Chairman, Senate SubCommittee on
the Constitution
108 Russell Senate Office Building
Washington D.C. 20510

Dear Senator Hatch:

On several occasions I have discussed with Mr. Rader, Marjority Counsel of your SubCommittee, the ramifications of Supreme Court of Virginia v. Consumer's Union of the United States (444 US 719, 64 L Ed2d 641, 100 S Ct 1969) decided June 2, 1980, and Pulliam v. Allen, et.al. (US Supreme Court No. 82-1432) decided May 14, 1984, as they relate to judicial immunity.

I have received a number of letters from Illinois judges expressing their deep concern over this problem, and enclose copies of some of the letters received, specifically, from Roy O. Gulley, Director, Administrative Office of the Illinois Courts; Judge Harry G. Comerford, Chief Judge of Cook County; Judge Harold W. Sullivan, Presiding Judge, Second Municipal District of Cook County and Secretary, National Conference of State Trial Judges, American Bar Association, (who includes in his letter a Resolution concerning the Pulliam case); Judge Joseph F. Cunningham, Chief Judge, 20th Circuit; Judge Ralph S. Pearman, Chief Judge, 5th Circuit; and Judges Howard Lee White and William Sunderman, defendants in section 1983 civil rights actions.

The erosion of common law immunity through recent decisions of the Supreme Court is a matter of grave concern, not only for the judges of Illinois, but for the judiciary throughout the United States as well. More and more judges are being sued under section 1983 of the Civil Rights Act, and now find themselves liable for attorney's fees under section 1988.

Consumer's Union mainly affects those judges with administrative duties, while Pulliam affects us all. As you are aware, Consumer's Union held that a judge has common law immunity from an action arising "out of a controversy which must be litigated", but that immunity does not extend to judicial administrative or ministerial acts. Frankly, I fear that many of our best and most capable judges will not accept positions of administrative responsibility due to the minefield of possible civil rights actions through which they must now cautiously tread. No one can force judges to take these positions -- they are purely voluntary and with no added salary. Many do so, but at the cost of time away from their families and added burden to themselves since most carry a full case load in addition to their administrative duties. Although it is in the public interest that the most qualified judges accept these positions, it is not likely that the constant threat of a civil rights action will encourage the most capable to stay as chief judges, or for others to assume those heavy responsibilities.

This two-pronged attack against immunity has been a surpise and shock to many judges. Anyone who has studied the common law is well aware of the importance and necessity of immunity to the administration of justice. The wisdom of the common law reasoned that a judge must be able to render his decisions without fear of suit or reprisal. To have it otherwise would be to defeat the very system designed over hundreds of years to protect the rights of those under the law. It is well understood that the shield of judicial immunity was not designed to protect the judge as a person, but rather the very essence of justice itself.

The Supreme Court in Pulliam has effectively steered the ship of judicial immunity into dangerous and uncharted waters. To hold that a judicial officer is immune from personal liability in a civil rights action, but not from assessment of attorney's fees arising from that action, is a distinction without a difference. A dollar paid out in attorney's fees is forfeited to the same degree as the dollar paid out in the original action, and it is not totally unheard of to have a civil rights award of a few dollars with attorney's fees in the thousands.

The fallout from these cases is just now beginning to be felt. For example, Illinois law mandates judicial oversight in a number of areas such as county jails, election boards, foster homes, detention homes, etc. This oversight function may have a beneficial effect in assuring an orderly operation of these institutions, but with the advent of Consumer's Union and Pulliam, judges are now having second thoughts about their oversight responsibilities, since many feel they do not have the necessary expertise, personnel, knowledge, or time that may be required for those responsibilities, especially if they may be sued for breach of those duties in a 1983 action. Judges are beginning to understand that in a civil rights action by a county jail prisoner, for example, the judge may be included as a defendant due to his oversight role and could possibly end up paying the plaintiff's attorney's fees under section 1988. As a result, serious consideration is now being given to the repeal of many oversight statutes.

These decisions also have a chilling effect on the independance of the judiciary and the distinct possibility that a judge will take the safe route, rather than the courageous one, when it comes down to hard choices. No one can possibly know how many judges may base an administrative or judicial decision on a threat -- real or imagined, expressed or implied -- of a civil rights action. Judge Sullivan, in his letter of August 23, 1984, wrote "(f)or a judge to be reversed by a higher court is one thing, but for him to be subject to personal liability is quite another because it forces a judge to consider the possibility of personal liability rather than the equities of the case before him in making decisions or drawing procedures. ... a judge can no longer approach these problems like a judge -- he must do it as though he were a potential defendant with possible personal liability". Retired Judge White, in his letter dated August 23, 1984, stated that "(t)he practical effect is going to be that State Judges will not make any administrative decisions".

Judges are constantly in the center of litigation and controversy, where tempers flare and many times anger is ultimately directed against the judge. Many disgruntled parties would bring suit against a judge if permitted -- *Consumer's Union* and *Pulliam* are the doors through which they now may pass.

Some have suggested indemnity statutes as a possible solution. Many do not believe this to be the answer, since the time, expense and burden of litigation is a clear reality in the minds of judges facing possible civil rights actions. Referring back to Judge White's letter, he writes that "(y)ou can imagine the amount of time that I had to take from my judicial and administrative duties because of this case. If I had it to do over I doubt if I would have taken the action I took because of the time involved". Such a reaction and result, multiplied many times over, cannot help but to damage the administration of justice in our country.

Judicial immunity is a necessary tool for the administration of justice if our citizens are to have their cases heard and decided by an uninhibited and unfrettered judiciary who do not constantly carry with them the peril of a civil rights action.

Immunity is as vital to the judicial branch in its administration of justice as congressional immunity is to the functioning of Congress.

With the erosion of common law immunity, statutory immunity is now, unfortunately, an absolute necessity and the only possible answer. With this in mind, please find enclosed proposed amendments to Title 42 USC 1983 and 1988 for your consideration.

With kindest personal regards, I am,

Cordially yours,

John P. Shonkwiler,
Circuit Judge

JPS:jc
Enclosures

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(a) No actions shall be brought pursuant to this Section against members of Congress or of the state and federal judiciary for any official, administrative or ministerial act done in the performance of their duties.

[42 USC § 1983]

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutues of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981 - 1983, 1985, 1986], title LX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.]; the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs; however, such fees shall not be assessed against members of Congress or of the state and federal judiciary who are named defendants in any such lawsuit initiated as a result of the performance of any official, administrative or ministerial act.

[42 USC § 1988]

City and County of San Francisco

206 City Hall
400 Van Ness Avenue
San Francisco, CA 94102
(415) 558-4123

Office of the City Attorney

GEORGE AGNOST CITY ATTORNEY

Philip S. Ward
Chief Trial Deputy

March 19, 1984

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20501

Subject: Hearings on S. 81 and S. 141

Dear Senator Hatch:

I am writing to express this office's concern about the awards of attorneys' fees that are proliferating under 42 U.S.C. §1988. Specifically, my complaint is that there is no "proportionality" requirement between the relief secured and the amount of fees subsequently awarded.

Two examples should suffice. Last year an officer of the San Francisco Airport Police was sued in federal district court under Section 1983 for an alleged false arrest coupled with excessive force. The case was tried to a jury. The jury concluded that the arrest was proper but that the officer had used some excessive force. It gave the plaintiff a judgment for $1,750. Thereafter the plaintiff's attorney made a motion for attonreys' fees pursuant to Section 1988. The District Court awarded in excess of $35,000 in fees. The entire case was then settled for approximately $35,000 rather tnan risk an appeal.

More recently, two San Francisco police officers were sued for false arrest and excessive force. Prior to trial the City of San Francisco offered to allow plaintiff to take judgment in the amount of $2,000. He rejected the offer, instead demanding $25,000. The case was tried to the jury, and it returned a verdict against one of the officers for $300. Again a Section 1988 fees motion was made, the court awarding over $4,000 in fees to the plaintiff's attorney.

I request that you consider the foregoing as convincing evidence that the fees awarded pursuant to Section 1988 must bear some relationship to the relief obtained, at least in cases where the relief is, in whole or in part, monetary damages. The recent decision by the United States Supreme Court in Hensley v. Eckerhardt provides some relief in this area, but legislative action is the only realistic solution to this problem.

The spectre of large fee awards has totally changed the dynamics of civil rights litigation. A plaintiff can "extort" a higher settlement because the municipalty knows that it only has to lose a little bit, or lose only one claim, and it will be subject to a very large fee award. The two cases mentioned above are in my mind every time I evaluate a case, and the plaintiff bar is certainly aware of them, as well as similar cases from other jurisdictions.

I fervently hope that some accomodation of interests can be reached in this most troublesome area of federal/state relationships.

Very truly yours,

GEORGE AGNOST
City Attorney

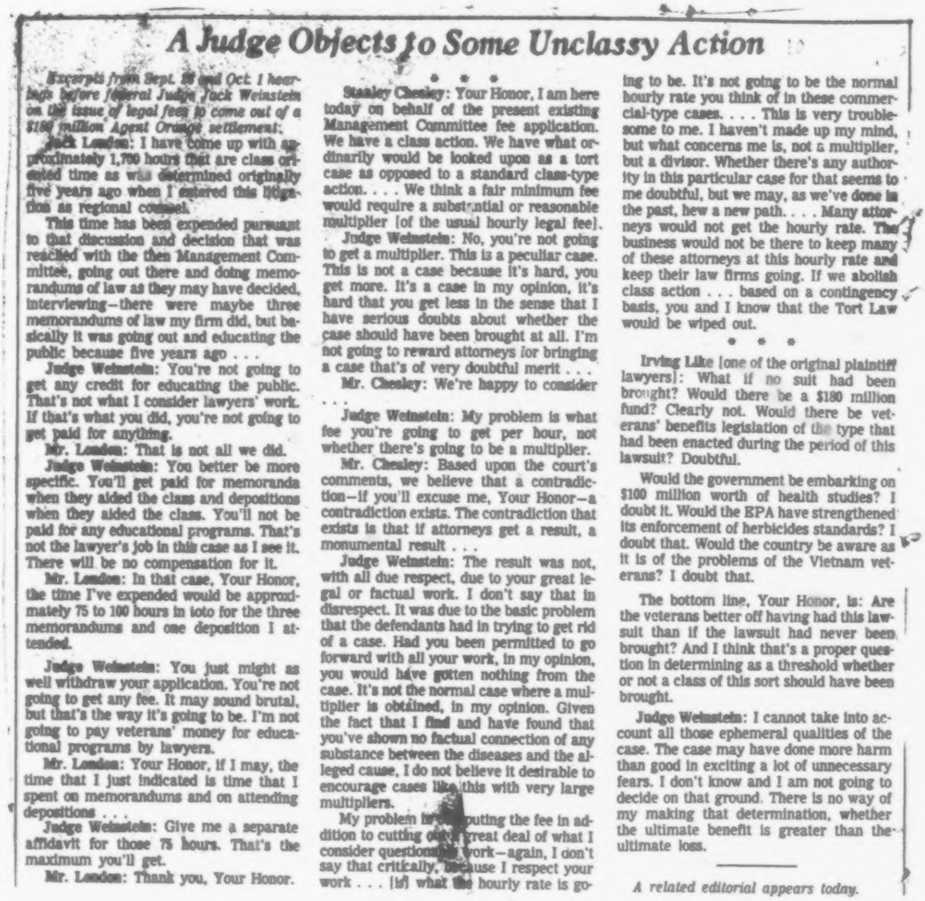
PHILIP S. WARD
Chief Trial Deputy

PSW:jr

cc: Senator Pete Wilson
Senator Alan Cranston

9210C

WALL STREET JOURNAL, OCTOBER 16, 1984



A Judge Objects to Some Unclassy Action

Excerpts from Sept. 28 and Oct. 1 hearings before federal Judge Jack Weinstein on the issue of legal fees to come out of a $180 million Agent Orange settlement:

Jack London: I have come up with approximately 1,700 hours that are class oriented time as was determined originally five years ago when I entered this litigation as regional counsel.

This time has been expended pursuant to that discussion and decision that was reached with the then Management Committee, going out there and doing memorandums of law as they may have decided, interviewing—there were maybe three memorandums of law my firm did, but basically it was going out and educating the public because five years ago . . .

Judge Weinstein: You're not going to get any credit for educating the public. That's not what I consider lawyers' work. If that's what you did, you're not going to get paid for anything.

Mr. London: That is not all we did.

Judge Weinstein: You better be more specific. You'll get paid for memoranda when they aided the class and depositions when they aided the class. You'll not be paid for any educational programs. That's not the lawyer's job in this case as I see it. There will be no compensation for it.

Mr. London: In that case, Your Honor, the time I've expended would be approximately 75 to 100 hours in toto for the three memorandums and one deposition I attended.

Judge Weinstein: You just might as well withdraw your application. You're not going to get any fee. It may sound brutal, but that's the way it's going to be. I'm not going to pay veterans' money for educational programs by lawyers.

Mr. London: Your Honor, if I may, the time that I just indicated is time that I spent on memorandums and on attending depositions . . .

Judge Weinstein: Give me a separate affidavit for those 75 hours. That's the maximum you'll get.

Mr. London: Thank you, Your Honor.

* * *

Stanley Chesley: Your Honor, I am here today on behalf of the present existing Management Committee fee application. We have a class action. We have what ordinarily would be looked upon as a tort case as opposed to a standard class-type action. . . . We think a fair minimum fee would require a substantial or reasonable multiplier [of the usual hourly legal fee].

Judge Weinstein: No, you're not going to get a multiplier. This is a peculiar case. This is not a case because it's hard, you get more. It's a case in my opinion, it's hard that you get less in the sense that I have serious doubts about whether the case should have been brought at all. I'm not going to reward attorneys for bringing a case that's of very doubtful merit . . .

Mr. Chesley: We're happy to consider . . .

Judge Weinstein: My problem is what fee you're going to get per hour, not whether there's going to be a multiplier.

Mr. Chesley: Based upon the court's comments, we believe that a contradiction—if you'll excuse me, Your Honor—a contradiction exists. The contradiction that exists is that if attorneys get a result, a monumental result . . .

Judge Weinstein: The result was not, with all due respect, due to your great legal or factual work. I don't say that in disrespect. It was due to the basic problem that the defendants had in trying to get rid of a case. Had you been permitted to go forward with all your work, in my opinion, you would have gotten nothing from the case. It's not the normal case where a multiplier is obtained, in my opinion. Given the fact that I find and have found that you've shown no factual connection of any substance between the diseases and the alleged cause, I do not believe it desirable to encourage cases like this with very large multipliers.

My problem [illegible]puting the fee in addition to cutting [illegible] great deal of what I consider questionable work—again, I don't say that critically, because I respect your work . . . [is] what the hourly rate is going to be. It's not going to be the normal hourly rate you think of in these commercial-type cases. . . . This is very troublesome to me. I haven't made up my mind, but what concerns me is, not a multiplier, but a divisor. Whether there's any authority in this particular case for that seems to me doubtful, but we may, as we've done in the past, hew a new path. . . . Many attorneys would not get the hourly rate. The business would not be there to keep many of these attorneys at this hourly rate and keep their law firms going. If we abolish class action . . . based on a contingency basis, you and I know that the Tort Law would be wiped out.

* * *

Irving Like [one of the original plaintiff lawyers]: What if no suit had been brought? Would there be a $180 million fund? Clearly not. Would there be veterans' benefits legislation of the type that had been enacted during the period of this lawsuit? Doubtful.

Would the government be embarking on $100 million worth of health studies? I doubt it. Would the EPA have strengthened its enforcement of herbicides standards? I doubt that. Would the country be aware as it is of the problems of the Vietnam veterans? I doubt that.

The bottom line, Your Honor, is: Are the veterans better off having had this lawsuit than if the lawsuit had never been brought? And I think that's a proper question in determining as a threshold whether or not a class of this sort should have been brought.

Judge Weinstein: I cannot take into account all those ephemeral qualities of the case. The case may have done more harm than good in exciting a lot of unnecessary fears. I don't know and I am not going to decide on that ground. There is no way of my making that determination, whether the ultimate benefit is greater than the ultimate loss.

A related editorial appears today.

PublicCitizen

Congress Watch • Critical Mass Energy Project • Health Research Group • Litigation Group • Tax Reform Group

September 21, 1984

Senator Orrin G. Hatch
Constitution Subcommittee
114 Russell Senate Office Building
Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Senator Hatch,

I am submitting these views on S.2802 and ask that they be included in the hearing record.

Congress Watch opposes S.2802. This bill would undercut the attorneys fees provisions of civil rights, consumer and environmental statutes, including the Civil Rights Attorneys Fees Award Act of 1976, the Freedom of Information Act, the Clean Air and Water Acts, the Safe Drinking Water Act, and the Toxic Substances Control Act. Congress voted to permit attorneys fees under these statutes and dozens of others beause it wanted to encourage enforcement of Congressional policies and Constitutional rights. Without attorneys fees, citizens simply cannot afford to bring actions to enforce the law.

S.2802 would hamper these law enforcement efforts by placing needless and unjustified restrictions on the collection of attorneys fees. The bill sets a ceiling of $75 per hour, eliminates the use of bonuses and multipliers in computing awards, and reduces fee awards by several other avenues. No substantial evidence has been produced to justify such drastic measures. It all adds up to less vigorous enforcement of critical statutes.

We support increasing fees for attorneys representing indigent defendants, but such legislation should be considered separately.

Thank you for your consideration of our views.

Sincerely,

Nancy Drabble

Nancy Drabble
Director

Public Citizen • 215 Pennsylvania Avenue S.E. • Washington, D.C. 20003 • (202) 546-4996

Natural Resources Defense Council, Inc.
1350 NEW YORK AVENUE, N.W.
SUITE 300
WASHINGTON, D.C. 20005
202 783-7800

New York Office
122 EAST 42ND STREET
NEW YORK, N.Y. 10168
212 949-0049

Western Office
25 KEARNY STREET
SAN FRANCISCO, CALIF. 94108
415 421-6561

September 21, 1984

The Honorable Orrin Hatch
135 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator Hatch:

We are writing to oppose S. 2802, the Legal Fees Equity Act. This bill would place numerous obstacles in the path of reasonable attorneys fee awards to parties litigating against federal, state or local governments, even if the parties prevail. Thus, the bill would seriously undermine private enforcement of our nation's environmental laws, many of which have been deliberately structured to provide reasonable fee awards to citizens and citizens organizations who redress illegal government action.

A subsidiary provision of the bill would also increase compensation for attorneys who represent indigent criminal defendants. This objective, however, could be achieved by passage of S. 2420, which now awaits action in your Subcommittee on the Constitution, or by eliminating all other provisions of S. 2802. Either course of action would avoid impediments to enforcement of environmental laws. We therefore urge you to reconsider S. 2802.

Sincerely,

Frances Dubrowski
Frances Dubrowski
Senior Attorney

FDmk

New England Office: 850 BOSTON POST ROAD • SUDBURY, MA. 01776 • 617 237-0472
Public Lands Institute: 1720 RACE STREET • DENVER, CO. 80206 • 303 377-9740

100% Recycled Paper

TESTIMONY OF
THE WASHINGTON COUNCIL OF LAWYERS

The Washington Council of Lawyers is a voluntary, bipartisan bar association that has sought, since its creation in 1971, to promote public service and public interest activity and to improve the administration of justice within the Washington, D.C. legal community. Its membership includes attorneys from large and small private law firms, government agencies, legal services programs, and civil rights and other public interest organizations. The Council is particularly concerned about the adequacy of resources to assure vigorous enforcement of the nation's civil rights, environmental and consumer laws by "private attorneys general" and government agencies. While the Council's comments focus, by way of example, on the impact of S. 2802 on enforcement of the nation's civil rights laws, our comments are equally applicable to other public interest litigation against the government involving fee-shifting statutes.

The Council believes that the provisions of The Legal Fees Equity Act, S. 2802, would seriously undermine private enforcement of the nation's civil rights law. It bears emphasis that the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 ("Fees Act") and other civil rights fee-shifting statutes were enacted to assure that the victims of discrimination are able to secure the legal resources necessary to enforce fully the rights conferred by the civil rights laws. In order to achieve this goal, it is essential that civil rights cases carry their weight in the legal marketplace, and not be treated as second class litigation.

S. 2802, by severely restricting the amount of fees available to civil rights attorneys in cases in which they prevail, will make it economically unfeasible for private attorneys to fulfill their proper role as private attorneys general in enforcing the civil rights laws. The substantial and unnecessary restrictions in S. 2802 virtually assure that experienced practitioners needed to undertake complex civil rights litigation will not be available and, accordingly, that for many victims of discrimination the civil rights laws will confer only "paper rights."

The Council opposes this misdirected effort to protect federal, state and local governments which violate the nation's laws at the expense of the victims of discrimination and at the risk of inadequate enforcement of civil rights laws. Our position on S. 2802 is set forth in more detail below.[1]

1. There is no need or justification for Congress to place further limitations on the award of attorneys' fees to counsel who prevail in civil rights litigation. The complaint that lawyers are obtaining or may obtain a "windfall" by handling civil rights cases simply ignores economic reality. Despite Congress' stated intent that "the amount of fee awards under [the civil rights statute] be governed by the same standards which prevail in equally complex Federal litigation, such as antitrust cases,"[2] awards in civil rights cases against governments have generally been below those which have long been routine in private antitrust and securities cases. As described in the statement of Charles McTeer before this Subcommittee,[3] the practice of civil rights law on behalf

---

[1] The Council's comments focus on only a few of the most troubling provisions of S. 2802 and the limited nature of our comments should not be taken to imply support for the provisions not discussed herein. For example, the Council also strongly opposes Section 6(c) of the proposed legislation, which would require a court to reduce monetary judgments up to 25 percent by the amount of attorneys' fees awarded. This provision, which could, for example, substantially reduce back-pay awards in Title VII cases, would undermine the objective of back-pay awards, which is "to make the victims of discrimination whole." Albemarle Paper Co. v. Moody, 422 U.S. 404 (1975).

[2] S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

[3] Written Statement of Charles Victor McTeer Before the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate (September 11, 1984).

of the victims of discrimination is, at best, economically marginal. The experience of the members of the Council confirms Mr. McTeer's statement.

Moreover, the idea that state and local governments are being abused by vast resources of civil rights organizations is simply a misperception. There is a clear imbalance of resources -- but it remains heavily in favor of governmental agencies. Reduction of fee awards in civil rights cases to below market rates will, in effect, provide a "windfall" to governmental agencies, which will have less incentive to end discriminatory practices or settle meritorious cases since their liability will be limited to bargain rates.

Further, we note that Congress carefully considered all of the arguments against a market-value approach in 1976, and rejected these arguments. The reasons currently advanced for further limitation of the fee statutes are in direct contradiction to the findings and concerns established by the 1976 legislative history of the Fees Act.

2. The $75 per hour cap on attorneys' fee awards is insufficient to make civil rights litigation against the government competitive in the legal marketplace.

The $75 cap, which bears no relation to the actual price of legal services in the marketplace, is far below the prevailing rate in many geographic areas. Moreover, the imposition of this artificially low cap, which does not account for expertise or experience, is directly contrary to Congress' intent to encourage skilled attorneys to handle complex civil rights litigation. Instead, it virtually assures that experienced practitioners will not be available to handle complex civil rights cases.

3. Elimination of the district court's discretion to adjust the lodestar rate would further assure that civil rights litigation against the government would not be competitive in the legal marketplace. The objective of an adjustment is not to provide a "bonus" to an attorney or to compensate attorneys for cases in which they do not prevail. Rather, it is, in part, to make it as attractive for an attorney to take on a civil rights suit, for which he is not assured of payment, as it would be for him to devote his time to representing a fee paying defendant, who guarantees him a fee regardless of the outcome of the suit. Elimination of any possibility of an adjustment of the rate charged in noncontingent cases to compensate for

the risk of not prevailing would make it economically unfeasible for many attorneys to take on contingent civil rights cases, thus defeating the goal of vigorous enforcement of the civil rights laws.

4. A fee award should not be reduced simply because an attorney is employed by a civil rights organization. S. 2802 would drastically change existing law, under which attorneys for civil rights organizations are awarded attorneys' fees at market rates. See Blum v. Stenson, 104 S. Ct. 1541 (1984). The provision permitting a district court unlimited discretion to reduce the amount of attorneys' fees if the award "unreasonably exceeds the hourly salary of the attorney representing the party" (Section 6(d)(3)), unfairly discriminates against attorneys employed by civil rights organizations. For example, it is unreasonable to compensate two attorneys with identical expertise and experience working on the same cases at different rates simply because one chooses to work for a private firm while the other chooses to work for a civil rights organization. Moreover, award of full market value fees to civil rights organizations is an important deterrent to unlawful behavior by defendants, which should not be permitted to benefit from the fortuity of the identity of

plaintiffs' attorneys, and provides civil rights organizations with necessary funds to continue private enforcement of the civil rights laws.

5. The Council strongly supports an increase in the hourly fees provided under the Criminal Justice Act. The present rates are grossly inadequate and jeopardize the rights of those accused of criminal conduct. The Council urges the Subcommittee to separate the proposed amendment of the Criminal Justice Act from those aspects of S. 2802 which deal with civil fee awards and to report promptly the legislation to amend the Criminal Justice Act.

* * *

In sum, attorneys' fees awarded at market rates are necessary to make it economically feasible for individual attorneys and private organizations to fulfill their important role as private attorneys general in enforcing civil rights, environmental, consumer and other laws enacted to protect the public. The Council opposes the civil fee provisions of S. 2802, which would permit governments to violate the nation's laws at bargain rates, and, in many cases, would make it economically infeasible for the victims of these violations to vindicate their rights.

Legal Defense Fund
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013•(212) 219-1900

September 10, 1984

Senator Orrin Hatch
Chairman, Subcommittee on
the Constitution
Committee on the Judiciary
United States Senate
Russell Office Building
Room 108
1st and Constitution Avenues, N.E.
Washington, D.C. 20510

Re: Senate S. 2802

Dear Senator Hatch:

The purpose of this letter is to express the opposition of the NAACP Legal Defense and Educational Fund, Inc., to the above bill insofar as it would affect the awards of counsel fees in civil public interest litigation. Preliminarily we also wish to make clear that we fully support, as long overdue, an increase in fee rates set by the Criminal Justice Act. We, therefore, recommend that your subcommittee report out favorably S. 2420, which would accomplish this end.

With regard to the modifications of the various statutes providing for fees in civil rights and other public interest litigation, we are firmly convinced that there is no basis whatsoever for enactment of the proposed legislation or, indeed, to modify the existing statutes at all. We refer your committee to our earlier testimony on this subject contained in the hearings on S. 584, S.585, and S. 990, Municipal Liability Under 42 U.S.C. § 1983, May 6, 7, July 8, and 23, 1981, at pp. 611-27. We also refer the committee to the recent report of the Association of the Bar of the City of New York on this subject which comprehensively discusses the issues and makes a compelling case for the need to strengthen and broaden the availability of attorneys' fees in civil rights cases, and not to restrict such recoveries. 39 The Record of the Assolciation of the Bar of the City of New York 300 (1984).

We intend to submit to the subcommittee a detailed response to the report of the National Association of Attorneys General and to the Memorandum of the Department of Justice of January 1984, which seek to justify the proposed legislation. Here, we wish to respond briefly to a number of the assertions and assumptions contained in those documents that supposedly form the basis for the legislation.

First, a central claim is that substantial government money, federal, state, and local, is being expended to pay for awards of attorneys fees to prevailing plaintiffs in public interest litigation. It is striking that virtually no data whatsoever is furnished to support this assertion despite the fact that such data should be readily available. Also notably absent is any comparative data. For example, the Department of Justice, various federal agencies, * many state attorney general's offices and local goverments employ private counsel to handle many types of cases. It would be interesting to know how much is expended by governments to defend various types of litigation through the employ of private counsel, and compare that to the amount of money expended when governments must pay counsel fees because they have been found to have violated the Constitution or laws of the land.

Second, various assertions are made that governments are besieged with meritless litigation, cases cannot be settled, litigation is unduly prolonged, etc. Although the NAAG report makes such a "finding" (p. 4), it provides no evidence whatsoever. Indeed, as the Legal Defense Fund has previously testified, much of the undue prolongation of government litigation is due to the litigation tactics of the government, and not to plaintiffs' counsel. The most recent example is the behavior of the United States Department of Health and Human Services, whose litigation tactics in Social Security disability cases have been roundly condemned by federal judges, United States Attorneys, and even by senior officials of the Department itself. **

Third, underlying the proposal is the notion, again wholly unsupported by any evidence, that there has arisen an "industry" of attorneys getting rich from fees in public interest cases. The Legal Defense Fund has worked throughout its existence with the private civil rights bar. We can assure the Subcommittee that representing plaintiffs in civil rights cases results in financial sacrifice, not enrichment. Indeed, the effective enforcement of civil rights laws is at a crisis point now because of the shortage of attorneys willing and financially able to bear the burdens it entails, particularly when the government is the opponent.***

---

*/ For example, it is well known that the Postal Service has retained a major Washington, D.C., firm at rates as high as $150 per hour.

**/ See, N.Y. Times, Sept. 9, 1984, p. 1, Col. C.

***/ To give an example, the Department of the Navy has recently solicited public bids for a contract to defend one of our Title VII actions (Moran v. Claytor, M.D. Fla. C.A. No. 73-702-Cio. J-S). The cost will probably exceed $500,000.

In conclusion, we urge that the proposed bill not be reported out. We further urge that your subcommittee investigate the following matters in its consideration of the Department of Justice's proposal:

1. How much have federal agencies and state and local government spent in FY 1980-84 to retain private counsel in all cases?

2. What is the cost to the government in lost revenue by allowing private businesses to take a tax deduction, as a business expense, for legal fees?

3. What data is collected by the Department of Justice and/or state and local governments to determine to what extent the fees that are paid are the result of their own litigation tactics?

I request that this letter be included in the record of the hearing of September 11, 1984, and that the Legal Defense Fund be allowed to supplement its submission at a later date. Thank you very much for your consideration of this matter.

Very truly yours,

Julius LeVonne Chambers

Julius LeVonne Chambers,
Director-Counsel

JLeVC/gj

BIBLIOGRAPHY ON ATTORNEY'S FEES UNDER 42 U.S.C. § 1988

Leading Cases

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)
("American Rule" against fee-shifting except where authorized by statute)

Blum v. Stenson, 104 S.Ct. 1541 (1984)
(market rates for legal services organizations; multipliers permissible in limited circumstances)

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)
(prevailing defendant may receive fees only if "plaintiff's action was frivolous, unreasonable, or without foundation")

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)
(applies lodestar method for computing amount of fee award)

Hanrahan v. Hampton, 446 U.S. 754 (1980)
(to receive interim fees, party must prevail on the merits of at least some claim)

Hensley v. Eckerhart, 103 S.Ct. 1933 (1983)
(amount of award should reflect degree of success)

Hughes v. Rowe, 449 U.S. 5 (1980)
(applies *Christiansburg* standard in a § 1988 case)

Hutto v. Finney, 437 U.S. 678 (1978)
(fee awards under § 1988 not barred by Eleventh Amendment)

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974)
(lists factors to be applied in computing a reasonable fee)

Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976)
(applies lodestar method)

Maher v. Gagne, 448 U.S. 122 (1980)
(fees may be awarded to party that prevails through settlement rather than litigation)

Maine v. Thiboutot, 448 U.S. 1 (1980)
(§ 1988 applies in all cases raising nonfrivolous federal constitutional or statutory claims)

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)
(factual and legal test for determining whether plaintiffs have prevailed)

National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982)
(detailed methodology for seeking fees and computing fee award)

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)
(prevailing plaintiff should receive fees "unless special circumstances would render an award unjust")

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)
(fees may be awarded for services rendered in administrative proceedings in Title VII case)

Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980)
(methodology for computing amount of fee award)

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)
(bad faith exception to American Rule against fee shifting)

Smith v. Robinson, 104 S.Ct. 3457 (1984)
(fees not available under § 1988 in action to enforce EHA)

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980)
(absolute immunity from fee liability for parties acting in judicial or legislative capacity)

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982)
(fees may be denied where appplicant's delay in seeking fees unfairly surprises or prejudices opposing party)

Legislative History

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976)

S. Rep. No. 1011, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 5908

Periodicals

Attorney Fee Awards Reporter (bimonthly)

Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977) (inconsistency in judicial computation of fee awards)

Case Comment, *Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorneys' Fees After Maine v. Thiboutot*, 61 B.U.L. Rev. 1069 (1981)
(argument that § 1988 should be narrowly construed to apply only to civil rights cases)

Comment, *The Scope of the Civil Rights Attorney's Fees Awards Act After Maine v. Thiboutot, Maher v. Gagne, and Supreme Court of Virginia v. Consumers Union*, 66 Iowa L. Rev. 1301 (1981)
(review of some landmark fee decisions)

Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act -- A Time for Change*, 16 J. Mar. L. Rev. 261 (1983)
(arguments for legislative reform of § 1988)

Judicial Discretion and the 1976 Civil Rights Attorneys Fees Awards Act: What Special Circumstances Render an Award Unjust?, 51 Fordham L. Rev. 320 (1982)
(review of special circumstances cases)

Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981)
(incentives and misincentives stemming from availability of contingency bonuses)

Note, *Awards of Attorney's Fees in the Federal Courts*, 56 St. John's L. Rev. 277 (1982)
(general review)

Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 Colum. L. Rev. 346 (1980)
(argues against contingency bonuses)

Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651
(arguments against multipliers)

Books

Attorneys' Fees--1982 (NHBA 1982)
(New Hampshire continuing legal education course materials)

Attorney's Fees--Recoverability and Deductibility (NJICE 1981)
(New Jersey continuing legal education course materials)

M. Derfner & A. Wolf, *Court Awarded Attorney Fees* (1983)
(practice-oriented three-volume treatise)

Federal Court Civil Litigation in the First Circuit (MCLE 1982) (Chapter IX)
(First Circuit continuing legal education materials)

E. Larson, *Federal Court Awards of Attorney's Fees* (1981)
(plaintiff-oriented hornbook)

A. Miller, *Attorneys' Fees in Class Actions* (1980)
(results of empirical study on how federal judges compute fee awards in class actions)

1984 CASE UPDATE

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

NIXON HANDY
Senior Assistant Attorney General
Temple of Justice AV-21
Olympia, Washington 98504

TABLE OF CONTENTS

I. Applicability of 1983/1988 35

II. Prevailing Party 41

III. Computing the Lodestar 47

IV. Multipliers. 54

V. Offers of Judgment 57

VI. Nonparties 59

VII. Attorney's Fees to Defendants. 62

VIII. Waiver 66

IX. Miscellaneous. 71

TABLE OF CASES

B & J Music v. McAuliffe,
719 F.2d 1536 (11th Cir. 11/83) 46

Baird v. Bellotti,
724 F.2d 1032 (1st Cir. 1/84) 70

Blum v. Stenson,
___U.S.___No. 81-1374 (3/84). 40,50,54,56

Brooks v. Alexander,
___F. Supp.___(D.C. Mid. Dist. Tenn. 9/84). . 51,52,60

Brown v. General Motors,
722 F.2d 1009 (2nd Cir. 11/83). 60

Chesney v. Marek, 720 F.2d 474
(7th Cir. 11/83) 58

Consolidated Freightways v. Kassel
730 Ff.2d 1139 (8th Cir. 3/84). 38,40

Craik v. Minnesota State University,
738 F.2d 348 (8th Cir. 7/84). 49

Davidson v. Keenan,
740 F.2d 129 (2nd Cir. 7/84). 64

Dooley v. Reiss,
736 F.2d 1392 (9th Cir. 7/84) 65

Duncan v. Poythress,
572 F. Supp. 777 (D.C. ND Ga. 10/83). 71

Garcia v. Ingram,
729 F.2d 691 (10th Cir. 3/84) 51

Garrity v. Gallen,
522 F. Supp. 171 (D.C. NH 1981) 59

Gerena-Valentin v. Koch,
739 F.2d 755 (2nd Cir. 7/84). 65

Gould v. Wisconsin Department of Industry
Labor and Human Relations,
___F. Supp___(W.D. Wisc. 5/84) 39

Grendel's Den v. Larkin,
582 F. Supp. 1220 (U.S.D.C. D. Mass. 3/84). 53,59

Gringas v. Lloyd,
___F.2d___(2nd Cir. 8/84) 41,42

Hart v. Walker, 720 F.2d 1443
(5th Cir., 12/84) 61

Heiar v. Crawford County,
____F.2d___(7th Cir. 8/84). 71

Hermes v. Hein, ___F.2d___,
(7th Cir. 8/84) 63

Hutcherson v. Board of Supervisors,
___F.2d___, (4th Cir. 8/84) 63

Illinois Welfare Rights Organization v. Miller
723 F.2d 564 (7th Cir. 12/83) 46

Irizarry v. Quiros,
722 F.2d 869 (1st Cir. 11/83) 72

Jeff D. v. Evans,
___F.2d___(9th Cir. 9/84) 67

Jordan v. Heckler,
___F.2d___(10th Cir. 9/84). 48

Knights of Ku Klux Klan v. East
Baton Rouge Parish, 735 F.2d 895
(5th Cir. 7/84) 45

Lauritzen v. Lehman,
736 F.2d (9th Cir. 7/84) 40

Lewis v. Brown & Root,
722 F.2d 209 (5th Cir. 1/84). 66

Maher v. Gagne, 448 U. S. 122 (1980). 35,36,37

Middlesex v. National Sea Clammers,
453 U. S. 1 (1981) 36

Mims v. Shapp, ___F.2d___(3rd Cir. 9/84). 52

Mitchell v. City of Los Angeles,
741 F.2d 283, (9th Cir. 8/84) 67

Murray v. Weinberger,
___F.2d___(D.C. Cir. 8/84). 54,55

NAACP v. City of Richmond,
____F.2d___, (9th Cir. 9/84). 41

National Treasury Employees v. IRS,
735 F.2d 1277 (11th Cir. 7/84). 69

New York v. Gaslight Club v. Carey
447 U.S. 54, 100 S.Ct. 2024, ... 50,56

Paragould Music v. City of Paragould,
738 F.2d 793 (8th Cir. 7/84). 43

Premachandra v. Mitts,
727 Ff.2d 717 (8th Cir. 2/84) 41

Pulliam v. Allen, U. S. S.Ct (5/84) 37

Singer v. State of New Jersey,
95 NJ 487, 472 A2d 138 (3/84) 44

Smith v. Cumberland School Committee,
703 F.2d 4 (1st Cir. 1983). 37

Smith v. Detroit Board of Education,
728 F.2d 359 (6th Cir. 2/84). 72

Smith v. Robinson,
U. S. S.Ct. No. 82-2120 (7/84). 35

Stathos v. Bowden,
728 F.2d 15, (1st Cir. 2/84). 52,57

Storch v. Payne
579 F. Supp. 1074 (D. MD. 1983),
Aff'd. 727 F.2d 1104 (4th Cir. 2/84) 42,44

Tarter v. Raybuck, ___F.2d___(6th Cir. 8/74). 62

Toth v. United Auto Workers,
___F.2d___(6th. Cir. 9/84). 46,60,68

Webb v. County Board of Education of Dyer County,
715 F.2d 254 (6th Cir. 1983). 47,50,52,56

White Mountain Apache Tribe v. Williams,
___F.2d___(9th Cir. 2/84) 39,40,69,70

Wojtkowski v. Cade,
725 F.2d 127 (1st Cir. 1/84). 72

Young v. Powell,
729 F.2d 563 (8th Cir. 3/84). 68

I. APPLICABILITY OF 1983/1988

Perhaps the most significant area of 1983/1988 litigation presently occurring relates to the interplay between 1983/1988 and various federal constitutional doctrines and statutes. This section discusses cases decided in 1984 which relate to 1988 and (A) Education of the Handicapped Act, (B) Judicial Immunity, (C) Commerce Clause, (D) Supremacy Clause, (E) Equal Access to Justice Act and (F) the First Amendment.

A. Education of the Handicapped Act.

Smith v. Robinson, ___ U.S. ___, decided July 5, 1984 (Docket No. 82-2120). Plaintiff, a victim of cerebral palsy and related handicaps, brought this action under the Education of the Handicapped Act (EHA) and also sought relief under 1983 and 1988. Upon prevailing, he sought attorneys fees under 1988, as the EHA did not provide for fees.

The district court held that, because plaintiff had alleged colorable 1983 claims, he was entitled to fees under Maher v. Gagne, 448 U.S. 122 (1980). Under Maher, the Supreme Court had held that when a prevailing claim is accompanied by a "substantial" though undecided 1983 claim, fees are appropriate if the 1983 claim is based upon the same nucleus of facts.

The First Circuit reversed, based upon Middlesex v. Natural Sea Clammers, 453 U.S. 1 (1981), which had held that where Congress had provided for a comprehensive enforcement mechanism for the protection of federal rights without providing for fees, a litigant may not obtain a private right of action by asserting 1983. The Supreme Court granted certiorari to resolve the conflict which had developed in the circuits on the interaction between Maher and Middlesex.

The Supreme Court ruled that the EHA was a comprehensive scheme established by Congress to aid states in complying with their constitutional obligations to provide education for handicapped children. The court determined that Congress intended handicapped children like plaintiff to pursue his constitutional claims to a free public education through this comprehensive scheme. The court held that the EHA provided the exclusive remedy for such claims and that 1983 was not available.

Regarding the interplay between Maher and Middlesex, the court ruled that where petitioners present distinctly different claims for different relief based upon different facts and legal theories, and prevail only on the non-fee claim, they are not entitled to fees simply because the other claim is a constitutional claim assertable through 1983.

B. Judicial Immunity.

Pulliam v. Allen, ___ U.S. ___, decided May 14, 1984. Plaintiffs were arrested for non-jailable misdemeanors (use of abusive and insulting language, being drunk in public) and were committed to jail when they were unable to meet bail imposed by the state magistrate. Plaintiffs sued the state magistrate claiming the magistrate's practice was unconstitutional. The United States District Court for the Eastern District of Virginia enjoined the practice and awarded costs and attorney's fees.

The state magistrate appealed to the Fourth Circuit, where the Court of Appeals rejected the magistrate's claim that the award of attorney's fees against her should have been barred by principles of judicial immunity (690 F.2d 376). The Supreme Court granted certiorari and affirmed the Court of Appeals and district courts. The court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity and that judicial immunity is not a bar to an award of attorney's fees under § 1988.

The magistrate argued in the Supreme Court that, as a judicial officer, she was absolutely immune from an award of attorney's fees. The Supreme Court ruled that the legislative history of 1988 indicates that Congress intended to provide for attorney's fees in cases where relief properly is granted against officials who are immune from damages awards. Essentially, the Court holds that attorney's fees are not damages.

The Court's ruling was a 5-4 decision. The dissent agreed with the petitioner that attorney's fees are the functional equivalent of monetary damages, and monetary damages are indisputably prohibited by judicial immunity.

C. Commerce Clause.

Consolidated Freightways v. Kassel 730 F.2d 1139 (8th Cir., March 27, 1984). Plaintiff was successful in its efforts to have Iowa's statutory ban on 65 foot twin trailer trucks declared invalid as a violation of the commerce clause. In denying plaintiff's motion for attorneys fees, the Eighth Circuit ruled that the commerce clause does not secure rights cognizable under 1988, stating:

> ". . . the type of rights protected by 1983 are important personal rights akin to fundamental rights protected by the Fourteenth Amendment. Any individual benefits accruing from the Commerce Clause are completely different from the rights protected by the Fourteenth Amendment and do not fall witin the scope of 1988."

The court also said:

> "Section 1983 is concerned with the relationship between individuals and the states in matters involving life liberty or property, and was not intended to apply to the distribution of powers between the general and state governments under our federal system."

The Eighth Circuit briefly discussed two cases which appear to be contra: Kennecott Corp v. Smith, 637 F.2d 181 (3rd Cir. 1980) and Confederated Salish and Kootenai Tribes v. Moe, 392 F.Supp. 1297 (D.Mont. ;975), aff'd (on other grounds) 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

D. Supremacy Clause.

White Mountain Apache Tribe v. Williams, ___F2d___ (9th Cir., Feb. 7, 1984). A tribe was successful in establishing that Congress had preempted state law respecting taxation of tribal logging activities and moved for attorney's fees under 1988. The Ninth Circuit ruled that for a 1983 cause of action to exist for a violation of federal statutory law, Congress must have intended in passing the law to have created "enforceable rights." "In order to give rise to a 1983 cause of action, a federal law must confer an enforceable right beyond its ability to trump conflicting state law." Slip opinion at 21. The Ninth Circuit held that federal laws preempting state regulation or taxation of Indian logging activities did not give rise to rights, privileges or immunities cognizable under 1983/1988.

Gould v. Wisconsin Department of Industry, Labor and Human Relations, ___ F.Supp ___ (W.D. Wis. May 25, 1984), currently on appeal to Seventh Circuit. Plaintiffs successfully challenged the consitutionality of Wisconsin Labor Law Violators List statutes and moved for attorneys fees under 1988. Wisconsin resisted the fees motion on the ground that the successful challenge rested on principles of federal supremacy rather than on a civil rights ground. The District Court held that Maine v. Thiboutot, Maher

v. Gagne, and Blum v. Stenson all stood for the principle that a supremacy clause challenge can be brought under 1983.

This case is currently on appeal to the Seventh Circuit where Wisconsin is relying upon Consolidated Freightways and White Mountain Apache for the proposition that cases arising out of the Supremacy Clause or Commerce Clause do not secure rights within the meaning of civil rights litigation.

E. Equal Access to Justice Act.

Lauritzen v. Lehman, 736 F.2d (9th Cir. July 5, 1984). Plaintiff was successful on constitutional grounds in her suit against the Navy based upon its threat to discharge her or reduce her rank because of her statements to a Navy psychiatrist that she might have homosexual tendencies. The District Court granted her attorneys fees as a prevailing party based upon language in the Equal Access to Justice Act which allows attorney's fees against the United States to the same extent that any other party would be liable under the terms of any statute which specifically provides for such an award. The District court reasoned that, since a state official would be liable for attorneys fees under 1988 for this conduct, the United States would be liable to the same extent under this language.

The Ninth Circuit reversed, disagreeing with the Eighth Circuit's decision in Premachandra v. Mitts, infra, by ruling that, under the Equal Access to Justice Act, Congress did not intend to authorize fees against the United States where fees would have been authorized under a 1983/1988 Action had the action been against a state.

Premachandra v. Mitts, 727 F.2d 717 (8th Cir. Feb. 9, 1984). The Eighth Circuit in effect expands the scope of 1988 by ruling that, under the Equal Access to Justice Act, the United States may be liable for attorneys fees under 1988 where a state official would be liable in a 1983 action for the same conduct.

F. First Amendment.

NAACP v. City of Richmond, ___ F.2d ___, (9th Cir., September 28, 1984). The NAACP successfully challenged a city parade ordinance on First Amendment (speech, assembly) grounds and were granted attorneys fees under 1988.

II. PREVAILING PARTY

Litigation over who is a prevailing party for 1988 attorneys fees purposes continues to produce widely differing results. In the first case discussed, Gringas v. Lloyd, the district court determined plaintiffs to be prevailing, even though they lost on every issue, because their information was helpful on the issue and because the lawsuit may have made the wheels of the bureaucracy move more quickly. In contrast, in Storch v. Payne, infra, discussed below, plaintiff in an employment discrimination lawsuit was not considered a prevailing party even though the state in settlement offered her a better paying job in state service.

Gringas v. Lloyd, ___F.2d___ (2nd Cir., Aug 3, 1984) Dkt. 84-7274. Plaintiff sued the state of Connecticut challenging its decision to close a state hospital which administered to persons afflicted with Tuberculosis and other chronic disabilities. Plaintiffs, who were patients at the hospital, alleged that the closing would violate their due process rights under the 14th Amendment and also constitute discrimination on the basis of race and handicap in violation of Title VII of Civil Rights Act of 1964.

Following the receipt of a report by court-appointed Special Masters, the district court denied plaintiffs' Motion for Preliminary Injunction and the state was allowed to close the hospital on schedule. Subsequently, the court denied all relief requested by plaintiffs, except for their request for attorney's fees.

The district court's award of attorney's fees was based on its determination that plaintiffs were a prevailing party even though they were not granted any of the relief requested. The court reasoned that the court appointed doctors satisfied the court that the state's closure plans were adequate. Also, the court felt that court action had helped to make the slow moving wheels of the beaucracy move more quickly.

The Second Circuit showed remarkable restraint in reversing, noting that the appointment of special masters who only aid the court in determining that it is appropriate to deny all relief is neither success nor the type of productive prodding that entitles one to 1988 relief. The Second Circuit remanded to the district court for findings and clarification on what success was achieved by plaintiffs which would justify attorney's fees. The court strongly suggests in its decision that the criteria used by the district court was not sufficient.

Paragould Music v. City of Paragould, 738 F.2d 793 (8th Cir., July 18, 1984). A video arcade sued the City of Paragould alleging that patrons of the arcade were being harassed and illegally detained by city officials. The arcade obtained a TRO and then went out of business. The case was dismissed as moot. The arcade moved for attorney's fees as a prevailing party. The court ruled they were not a prevailing party, even though they did obtain a TRO, because there was no indication of any liklihood of success on the merits. By obtaining the TRO, plaintiffs merely preserved the status quo.

Storch v. Payne, 579 F. Supp. 1074 (D. MD. 1983), Aff'd. 727 F.2d 1104 (4th Cir., Feb 1, 1984). The state entered into a settlement with plaintiff of an employment discrimination lawsuit. Under the terms of the agreement, the state agreed to place the plaintiff in another higher paying job in state service, but not with the same department. Plaintiff's motion for attorneys fees was denied, the district court having determined that plaintiff was not a prevailing party.

The court looked behind the settlement and determined that plaintiff probably would not have succeeded on the merits. Further, the court noted that the employment offered by the settlement, even though it was a better paying job, would not have been available to plaintiff had she prevailed in the litigation.

Singer v. State of New Jersey, 95 N.J. 487, 472 A.2d 138 (March 19, 1984). Pet. Cert. to U.S. Supreme Court pending. Plaintiff successfully challenged the constitutionality of statute prohibiting business or financial connections between casino licensees and certain state offices. The state opposed attorney's fees on the ground that there was insufficient state action to trigger 1983 and 1988.

The state noted that none of the named state defendants engaged in any action sufficient to create 1983 liability. It pointed out that New Jersey Governor Byrne allowed the new law to become effective without his formal signature. Neither the Attorney General nor the enforcing agency took any affirmative steps to enforce the law. Thus, the state argued, the harm asserted by plaintiffs did not arise as the result of any individual's official actions. Rather, they argued the harm arose simply from the passage of the law itself, which was entirely a legislative action over which none of the defendants exercised any control and over which the legislature itself would be absolutely immune from suit.

The New Jersey Supreme Court disagreed, finding there was sufficient state action to bring a 1983 suit. The court relied upon the Supreme Court of Virginia v. Consumer's Union, 446 U. S. 719 (1988) in which the Supreme Court held the power to enforce and the possibility of future enforcement gave rights to liability in a § 1983 action. A petition for certiorari is pending in the Supreme Court.

Knights of Ku Klux Klan v. East Baton Rouge Parish, 735 F.2d 895 (5th Cir., July 9, 1984). The Klan prevailed only by virtue of a change of law, in this case the enactment of the Equal Access to Justice Act. The court noted:

> "There is concededly a windfall dimension to an award of fees to counsel whose prevailing party status would not have been possible without a change in law for which they were in no way responsible. We have been hesitant to award fees when the results, while 'winning ones,' were not the fruit of counsel's labor." At 902.

The Fifth Circuit's grant of fees was based upon express lenguage in the Equal Access to Justice Act providing that the attorneys fees provisions were applied to pending cases. Fees were also assessed against state defendants under 1988.

Toth v. United Auto Workers, ___F.2d___ (6th Cir., Sept 17, 1984). In a labor dispute between an employee and management, the district court granted attorneys fees to an employee based upon benefits he received in a settlement agreement. The Sixth Circuit reversed and remanded for further inquiries regarding the nature of the benefits plaintiff received. The Seventh Circuit questioned whether the relief obtained by plaintiff was causally related to his lawsuit and also whether defendants' conduct was actually required by law. Under the circumstances presented, court suggested that the final result might well have been obtained without a lawsuit, even though it was favorable to plaintiff.

Illinois Welfare Rights Organization v. Miller, 723 F.2d 564 (7th Cir., December 13, 1983). The 7th Circuit reiterates the prevailing party test: plaintiff's lawsuit must be causally linked to the achievement of relief obtained and defendant must not have acted wholly gratuitously. Plaintiff's claim if pressed cannot have been frivolous, unreasonable or groundless.

B & J Music v. McAuliffe, 719 F.2d 1536 (11th Cir., November 21, 1983). The producers of the theatrical production "Oh! Calcutta" filed an action seeking declaratory and injunctive relief to prevent the county from making any arrests or taking any actions to enforce state criminal laws with respect to their production.

At the TRO hearing, a county official testified that they never intended to make any arrests. The TRO motion was then denied as moot. Several other procedural skirmishes followed with neither party obtaining relief. When the case was settled, the plaintiff's moved for attorney's fees claiming prevailing party status because the performances of the play had been completed without incident.

The district court and the 11th Circuit ruled that the producers of the play were not prevailing parties as they did not actually achieve any significant relief to which they were entitled and did not vindicate a civil right issue in the litigation.

III. COMPUTING THE LODESTAR

This section discusses several recent circuit court decisions which attempt to apply Hensley and Blum. Another major area heavily litigated in 1984 concerns the extent to which fees incurred in related state court and administrative decisions may be included within the lodestar figure. Regarding this issue, on April 16, 1984, the Supreme Court granted certiorari in Webb v. County Board of Education, discussed below. Hopefully, the Supreme Court will use Webb as a means to set standards in this area.

Jordan v. Heckler, ___F.2d___ (10th Cir., September 24, 1984), Dkt. No. 83-1636. Plaintiff social security recipients challenged procedures under which representatives are selected to receive payments on behalf of social security recipients. Plaintiffs also raised issues as to whether such representatives are required to make periodic accountings and as to how complaints for misuse of funds should be handled.

Three issues were presented. Plaintiffs lost on two issues and prevailed on one: representatives held required to file periodic accountings. Although plaintiffs' success was only partial, the District Court determined that plaintiffs were prevailing based upon the accounting claim and awarded a fully compensatory fee.

The Tenth Circuit noted that "this appears to be a close question" but could not find that the trial court abused its discretion. Significantly, while noting that Hensley requires the award to relate to the degree of success, the court observed that plaintiffs had obtained an "excellent result." Since Hensley also stands for the proposition that an excellent result is normally entitled to a fully compensatory fee, the Tenth Circuit reasoned that even though plaintiffs did not prevail on all their claims, the district court could have reasonably found them to be entitled to a fully compensatory fee. The court seems to ignore the requirement that the award relate to the degree of success. The Tenth Circuit advanced these obserations on Hensley and Blum:

(1) Prevailing market rate times reasonable hours should

produce a reasonable fee;

(2) Novelty and complexity are reflected in the number of hours;

(3) Skill and quality are reflected in the reasonableness of the rates;

(4) The number of persons benefited is not of significance;

(5) A strong showing is required for any variation from the lodestar;

(6) "Excellent results" pertains to the entire litigation--considering it as a whole.

The Tenth Circuit seems to be saying that a "strong showing" is required for any variation from the lodestar, while the more likely intent of Hensley and Blum is that a strong showing of exceptional circumstances must be presented for an enhancement, but that fees should normally be reduced where necessary to make the award relate to the degree of success.

Craik v. Minnesota State University, 738 F.2d 348 (8th Cir. July 20, 1984). Plaintiffs' award of $126,127 represented a reduction of the lodestar by 20 percent to reflect the less than completely successful result obtained but was coupled with an enhancement of 25 percent for two of plaintiffs' attorneys for risks assumed in taking case. The court noted that Blum v. Stenson left open the possibility that "the risks assumed by counsel in taking a case can be a ground for enhancement." 738 F.2d at 350. The Eighth Circuit felt this case presented a compelling basis for an enhancement on the basis of risk, noting that there was a very real possibility that no fee at all would have been obtained.

> "The risk here went beyond the normal contingent fee situation. In Mr. Quiggle's case, for example, substantially all of his professional time between December of 1982 and June, 1983 was spent on this appeal. Investment of that much time out of one's law practice with no real hope of compensation if the appeal should prove unsuccessful is indeed a major risk, one that we think should be taken into account in setting a reasonable fee. In our opinion, an enhancement of 25% for the time spent by Messrs. Quiggle . . . is appropriate."

Webb v. County Board of Education, 715 F.2d 254 (6th Cir., August 29, 1983) cert. granted, 104 S.Ct. 1906 (April 15, 1984). The Sixth Circuit holds that attorneys fees under 1988 are only authorized for work performed in administrative proceedings where those proceedings are a prerequisite to filing suit in federal court. Here, plaintiff sought administrative relief before a state administrative tribunal which was not necessary to his filing in federal court and fees allocable to that effort were denied.

The Sixth Circuit distinguished New York v. Gaslight Club v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980), in which the Supreme Court held that fees were allowable in a Title VII employment discrimination case. The Sixth Circuit cites cases in the Second, Third, Fifth and Eleventh Circuits for support while noting that the Eighth and Seventh Circuits have ruled contra. See discussion 715 F.2d at 257-258. The Supreme Court granted certiorari in Webb on April 16, 1984.

Garcia v. Ingram, 729 F.2d 691 (10th Cir., March 12, 1984). A Title XX homemaker services benefits claimant who substantially prevailed in a state administrative proceeding without filing a district court civil rights action filed a 1988 action seeking attorneys fees as a prevailing party in a "proceeding" to enforce the provisions of 1983. The district court ruled, and the Tenth Circuit affirmed, that "proceeding" as used in 1988 does not include a nonmandatory state administrative proceeding.

The court commented:

> "Appellant argues that it is anomalous to deny attorney's fees where a party resolves a dispute through an avenue requiring a minimum of time and expense, and which is not burdensome on the crowded federal court docket, while awarding attorney's fees to a party who forces the case to court--thus clogging the courts and expending a great deal more time and money. We are sympathetic to this logic, but we may not award attorney's fees unless they are authorized by statute." 729 F.2d at 692.

Brooks v. Alexander, ___F.Supp.___ (D.C. Mid.Dist.Tenn., Sept. 13, 1984). The district court deferred deciding whether fees would be allowed for services rendered in an optional state court proceeding, noting that the Sixth Circuit did not allow such fees in Webb v. County Board of Education of Dyer County, 715 F.2d 254 (6th Cir. 1983) and that the Supreme Court had granted certiorari in Webb, 104 S.Ct. 1906 (April 16, 1984)(No. 83-1360).

Also in Brooks, regarding the reasonableness of the lodestar, the District court noted plaintiff's request for $125,032.22 included $74,848.75 for preparing the fee application. Considering plaintiff's five page motion, eight page memorandum and a reasonable time for reconstruction of time records, the court reduced the allowable hours on the fee application from 394.65 to sixty. The ultimate fee awarded was $30,293.87.

Stathos v. Bowden, 728 F.2d 15, (1st Cir., February 22, 1984). The First Circuit upheld the district court's inclusion into the lodestar of hours spent by plaintiff's counsel defending a related state court action which defendants brought against them for declaratory judgment relief since issues in the state suit were virtually identical as the federal case, the defendants filed the state action to preempt the federal action and plaintiffs were forced to defend or lose their federal claim through collateral estoppel. "Defense of the state court action was a necessary part of plaintiffs' effort to achieve their 1988 goal." 728 F.2d at 22.

Mims v. Shapp, ___F.2d___ (3rd Cir., September 17, 1984) Dkt. No. 83-5906. The Third Circuit applied Hensley v. Eckerhart to a case brought by a prisoner who was successful in the district court but whose success was substantially reduced on appeal. The Third Circuit, noting it was an exception to the general rule, computed the fee itself for the "conservation of judicial resources." The case had existed for over ten years, been heard by three separate district judges, three separate panels of the Third Circuit, and in one instance, the court in banc. The Third Circuit, based upon the limited successful result on appeal, simply divided attorneys fees in half, from $8,200 to $4,100.

Grendel's Den v. Larkin, 582 F.Supp. 1220 (U.S.D.C. D.Mass., March 19, 1984). Attorneys who were prevailing counsel in "civil rights" action brought by Harvard Square restaurant seeking liquor license from the state sought attorneys fees.

Lead counsel, Harvard Law Professor Lawrence Tribe, was awarded fees at $275 an hour. The court recognized Professor Tribe to be a nationally recognized constitutional scholar who charged private law firms consulting services at rates between $325 and $525 an hour. Second lead counsel was awarded $125 an hour and a third attorney, who had no agreement as to compensation and who had worked largely as an assistant to lead counsel, was held not entitled to fees under 1988.

Plaintiff's counsel maintained less than model time records. The district court held, however, that the failure to maintain time records does not alone justify an automatic reduction or rejection of fees. The Court ruled it must make an "individualized judgment" on the evidence that is submitted. The court did use the failure to keep time records as a basis for not applying a multiplier which it otherwise felt would have been in order. The case is currently on appeal to the First Circuit.

IV. Multipliers

A major event of 1984 in terms of attorneys fees was the Supreme Court's issuance on March 21 of Blum v. Stenson. Blum sets forth standards under which a multiplier or upward adjustment may be applied. On August 24, the Tenth Circuit, in Murray v. Weinberg, issued a decision extensively discussing the new Blum standards. These two cases are discussed below.

Blum v. Stenson, ___ U.S. ___, decided March 21, 1984, Docket No. 81-1374. Plaintiffs, represented by the Legal Aide Society of New York, a private non-profit law office, filed this civil rights action in Federal District Court in New York on behalf of a state-wide class of Medicaid recipients. Plaintiffs were successful and, after the Second Circuit affirmed, moved for an award of attorney's fees under 42 U.S.C. 1988. Plaintiff's total requested fee amounted to $118,968, consisting of $79,312 based on some 809 hours of work at rates ranging from $95-105 per hour, plus a 50 percent bonus of $39,656. Plaintiffs' counsel had argued the bonus was necessary to compensate for the complexity of the case, the novelty of the issues, and the "great benefit" achieved.

The district court awarded the full amount requested, including the bonus, on the basis of the quality of representation, the complexity of the issues, the riskiness of success, and the great benefit to the large class that was achieved. The Second Circuit affirmed at 671 F.2d 493. The Supreme Court held:

> "(1) 'Reasonable fees' in Federal Civil Rights actions are to be calculated according to prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel;
>
> "(2) The Court may authorize, in its discretion, to a prevailing party an upward adjustment in attorney's fees in cases of exceptional success;
>
> "(3) In Blum, plaintiffs failed to carry their burden of justifying an entitlement to the upward adjustment."

Significantly, the Court also found that where the defendant failed to submit to the district court any evidence challenging the accuracy and reasonableness of the hours charged or to rebut facts asserted in plaintiffs' counsel's affidavit, it waived its right to an evidentiary hearing and its right to challenge the district court's determination that the number of hours billed were reasonable for cases of similar complexity.

Regarding the upward adjustment, the Court holds that such adjustments are appropriate only in the "rare" case of "exceptional success." The burden of proving that an upward adjustment is appropriate is on the applicant. The fee applicant must offer specific evidence to show the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that success was exceptional.

Neither complexity nor novelty of issues is an appropriate factor in determining whether to award an upward adjustment. The Court reasoned that the novelty and complexity of issues are presumably reflected in the number of billable hours reported by counsel.

Regarding the Court's grant of fees based on a market rate standard to a nonprofit legal aid organization, the Court states: "Policy arguments in favor of a cost-based standard should be addressed to Congress rather than to this court."

Murray v. Weinberger, ___ F.2d ___ (D.C. Cir. August 24, 1984), Docket No. 83-1680. In this case, the District Court had computed a lodestar figure and adjusted upward for (1) the quality of representation, (2) the risk of losing and (3) delay in payment. Attorneys #1 and #2 received a 1.5 multiplier and attorney #3 received a 1.8 multiplier (for "above average" quality of representation).

The court reiterated that under Blum it was only the "exceptional" and "rare" case which merits an upward adjustment and that a heavy burden is on the applicant to justify an enhancement. The applicant must make a "specific claim" based upon a "particular factor." General allegations are insufficient. The district court has the duty to explain "with particularity" any upward adjustment.

The D.C. Circuit remanded to the district court to explain the basis for the lodestar and to explain precisely which factors are responsible for which percentage adjustments to the lodestar figure.

The court discusses the extent to which quality of representation, risk of nonpayment and delay in payment are to be considered. Essentially, quality of representation and risk of nonpayment are to be considered only in the rare and exceptional documented cases.

Regarding delay in payment, the court remanded for further findings, instructing that if the delay factor is already taken into account in the lodestar, delay should not be considered further. That is, if the lodestar already uses hourly rates which relect the market rate, the lodestar is adequate. If, however, the hourly rate is computed over an extended period of time at a constant rate based upon the initial year, delay in payment may be considered to bring the lodestar up to date. "[A]n increase for delay is generally not appropriate if the lodestar itself is based on present hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered." Slip opinion at 19, court's emphasis.

V. Offers of Judgment.

The Supreme Court this year granted certiorari in Chesney

v. Marek, discussed below, which relates to the relationship between CR 68 Offers of Judgment and 1988 attorneys fees. Until that decision is handed down, this important area will remain clouded.

Chesny v. Marek, 720 F.2d 474 (7th Cir., Nov. 3, 1983), cert. granted ___S.Ct.___ (___________, 1984). Prior to trial, defendants offered as settlement $100,000 including attorneys fees and costs pursuant to CR 68. CR 68 provides that if such offers are made and rejected and the subsequent judgment is less than the offer, the offeree must pay the costs incurred after the making of the offer. Upon plaintiffs recovering less than the offer, the District Court invoked the rule.

The Seventh Circuit reversed, noting that the District Court's analysis was too mechanical:

> "The district court's conclusion . . . rests on the following rather mechanical linking up of Rule 68 and section 1988. Since this is a civil rights case, since Rule 68 refers to costs, and since section 1988 allows attorney's fee to be taxed as costs in civil rights cases, Rule 68 costs must include any section 1988 attorney's fees that might be awarded to the prevailing plaintiff. . . ." 720 F.2d at 478.

The Seventh Circuit held in effect that Rule 68 does not apply to 1988 cases, commenting:

> "Placing civil rights plaintiffs and counsel in this predicament cuts against the grain of section 1988. 'Private attorneys general should not be deterred from bringing good faith actions to vindicate the fundamental

> rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.' . . . By the same token they should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at the trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer. . . . Moreover, since 10 days before trial is merely the deadline for the offer, if it were made right after the complaint was filed it might deter the plaintiff's lawyers from conducting any pretrial discovery." 720 F.2d at 479.

The Supreme Court has granted certiorari in this important case.

Garrity v. Gallen, 522 F.Supp. 171 (D.C.N.H. 1981), currently pending decision in the First Circuit. This is New Hampshire's major litigation concerning a state institution for the retarded. The state's offer of judgment constituted a broad offer to enter a consent decree, making any comparison with the ultimate relief granted more difficult. New Hampshire is currently awaiting decision from the 1st Circuit.

VI. NON-PARTIES

At least four recent cases have been decided which address the ability of the court to award fees under 1988 against or to nonparties. These cases are discussed below.

Brooks v. Alexander, ___ F.Supp. ___ (D.C.M.D. Tenn., Sept. 13, 1984). Plaintiff's counsel sought fees on behalf of two attorneys with whom he had consulted in the case. "Although Plaintiff's counsel may recover fees for time spent with consultants, the attorneys consulted in this case may not seek fees where no notice of appearance was entered.

Toth v. UAW, ___ F.2d___ (6th Cir., Sept 11, 1984), Dkt. Nos. 82-1799, 82-1831, 83-1543. This was a labor dispute with multiple lawsuits consolidated and involving multiple plaintiffs and defendants. A settlement agreement was entered under which the district court determined the plaintiffs to be partially prevailing and awarded attorneys fees against several defendant unions under a common benefit theory (not 1983). Although the unions were not actual parties to the causes of action involved, the court awarded fees since it did have jurisdiction over them, they were the benefitting party of management's improper conduct and because they held the common fund.

The Sixth Circuit reversed, holding that it constituted a violation of Article III of the Constitution for a court to award attorneys fees against a non-party.

Brown v. General Motors, 722 F.2d 1009 (2nd Cir., November 4, 1983). An attorney moved for attorneys fees who had been discharged because of his client's dissatisfaction with his representation and before negotiation of a settlement of the client's civil rights action by another attorney. The district court denied the motion.

On appeal, the Second Circuit affirmed, noting that it is the prevailing party rather than the lawyer who is entitled to fees under 1988. Further, an entitlement to fees is premised upon a contractual relationship between the attorney and client. The circuit court held the attorney "lacked standing" under 1988 to claim attorney's fees in his own name as a real party in interest. "Section 1988 does not create a separate action for attorney's fees." 722 F.2d at 1012.

Hart v. Walker, 720 F.2d 1443 (5th Cir., December 16, 1983). Plaintiff landowners obtained a judgment against a county supervisor for wrongful removal of culverts from their property. The county was not named as a defendant. The plaintiffs sought to enforce their judgment against the county. The district court held the county could not be held liable for the judgment as a nonparty.

The Fifth Circuit reversed, ruling that where the county was clearly aware of the actions of the supervisor, the county paid the supervisor's legal fees and county officials testified at the trial, it was not a denial of due process to hold the county responsible for the supervisor's actions even though it had not been named as a party. Attorney's fees under 1988 were also awarded against the county.

The Fifth Circuit did have misgivings about the decision and issued this warning:

"Because of the potential for unfairness in other factual

> settings, and in light of the potential conflicts of interest between the municipal entity and the putative public official in section 1983 actions, we hold that our warning in Gray will henceforth be the rule in this circuit: To impose liability on a municipal or governmental entity in a section 1983 action filed after the date of this opinion, the plaintiff must join the entity as a defendant in the suit." 720 F.2d at 1445.

VII. ATTORNEYS FEES TO DEFENDANTS

The district courts in 1984 appeared more disposed to award attorneys fees to defendants than did the circuit courts. In the following seven cases, the circuit courts reversed defense fee awards in five of the cases.

Tarter v. Raybuck, ___ F.2d___ (6th Cir., Aug. 31, 1974) Dkt. No. 83-3174. This case involved a high school marijuana smoker who alleged false imprisonment by school administrators who caught him smoking in the school parking lot. The defendants prevailed on every issue and the district court ruled the case to be wholly without merit and awarded fees to defendants.

The Sixth Circuit reversed, finding the district court's ruling to be abuse of discretion. The circuit court noted that searches by school officials involves an unsettled area of the law and that the presence of police at the school raised questions as to the appropriate standard to which the school officials should be held.

Hutcherson v. Board of Supervisors, ___ F.2d___, (4th Cir., August 23, 1984), Dkt. 82-2109. Citizens challenged a utility tax imposed by a county Board of Supervisors in Virginia. The district court dismissed the action and awarded fees to Defendants.

The Fourth Circuit affirmed, noting that the case presented a question of law which had been well settled prior to commencement of the suit and which was confirmed by a court decision handed down during the suit. When the new case was handed down, rather than dismissing their case, plaintiffs amended their complaint and asked for more relief. The court found the suit meritless.

Hermes v. Hein, ___ F.2d___, (7th Cir., August 17, 1984), Dkt. Nos. 82-3099 and 83-2119. A police officer sued under 1983 for political discrimination in employment. The district court granted summary judgment and awarded fees to defendants upon finding that plaintiffs' lawsuit "lacked any factual substance from the outset." Slip opinion at 10. Fees were awarded in the amount of $87,326.50 and costs of $2,344.65.

The Seventh Circuit reversed, noting that discovery did produce some evidence of discrimination. In finding that the case was not totally devoid of merit at the outset, the court quoted from Christiansburg Garment Co. v. EEOC, 434 U.S. at 422:

> "No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify

> in the midst of litigation. Even when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."

The court did find, however, that while the court abused its discretion in finding the suit meritless at the outset, the circuit court felt at some point this case may have become frivolous or vexatious. The case was remanded for the district court to determine whether such a point was reached and, if so, to allow attorneys fees from that point forward.

Finally, the Seventh Circuit directed the district courts to monitor closely questionable cases and to build a record so that the appellate court will have standards for making these types of determinations in future cases and to encourage plaintiffs from not pursuing a case beyond the point when it becomes apparent that the case clearly has no merit.

Davidson v. Keenan, 740 F.2d 129 (2nd Cir., July 18, 1984). Plaintiff probation officers sued under 1983 alleging that county officials conspired to bypass them for promotions. The district dismissed the case and refused to award attorney's fees because plaintiffs had acted in good faith reliance on the advice of counsel.

The Second Circuit reversed, noting that the test for defendant's attorneys fees is not whether plaintiffs act in good faith or on advice of counsel. The test is whether the claim is clearly meritless.

Dooley v. Reiss, 736 F.2d 1392 (9th Cir., July 10, 1984). "Horticulturally speaking, this case is a sucker springing from the roots of another civil rights action." 736 F.2d at 1393. District court dismissed plaintiffs' complaint alleging conspiracy to commit perjury and conceal evidence in the original civil rights action and awarded attorney's fees to one defendant under 1988.

The Ninth Circuit reversed, finding that the case presented difficult issues not previously resolved in the circuit. The case was properly dismissed but was not groundless or without foundation.

Gerena-Valentin v. Koch, 739 F.2d 755 (2nd Cir., July 3, 1984). A New York City Councilman brought this class action on behalf of city's Puerto Rican and other Hispanic voters alleging violations of Voting Rights Act by failing to preclear a redistricting plan and to provide adequate bilingual assistance to Hispanic voters. Plaintiff's case was dismissed by the district court and defendants were awarded attorneys fees under 1988.

The Second Circuit affirmed, noting that the lawsuit was duplicative of an action already litigated and resolved in the New York state trial and appellate courts and that no real supporting evidence was ever produced.

Lewis v. Brown & Root, 722 F.2d 209 (5th Cir., January 9, 1984). After defendants prevailed on every issue, the district court awarded attorney's fees against plaintiffs on the basis that they should not have proceeded to trial. The Fifth Circuit reversed, noting that if plaintiffs only acted "unreasonably and vexatiously" in taking the case to trial, fees should be apportioned between pretrial proceedings and the actual trial. The case was remanded for the district court to enter further findings on this point. Even though defendants partially prevailed on appeal, the Circuit Court found the appeal to be "in great part frivolous, unreasonable and without foundation and that, in view of the record, it largely constituted an unreasonable and vexatious multiplication of the proceedings in the case." 722 F.2d at 210. Accordingly, the Court awarded defendants attorneys fees on appeal and double costs.

VIII. WAIVER

On September 20, 1984, the Ninth Circuit ruled that the district courts should not accept fee waivers in class action lawsuits if negotiated simultaneously with relief for the class. This case is discussed below along with several others involving settlement agreements which make no express provision for attorneys fees.

Jeff D. v. Evans, ___ F.2d ___(9th Cir., September 20, 1984)

Dkt. 83-3839. The State of Idaho settled a class action to improve conditions of mentally and emotionally handicapped children institutionalized by the State. One term of the settlement was that the state would not bear any of plaintiffs' attorneys' fees. The settlement was subject to approval by the district court. After entering into the settlement agreement, plaintiffs moved for attorneys fees and appealed the district court's denial to the Ninth Circuit.

The Ninth Circuit reversed and remanded for a determination of fees. The state's contention on appeal was that plaintiffs should be bound by their agreement. The circuit court disagreed, ruling that the district court has a strict obligation to review all class action settlements for reasonableness, "particularly those related to attorney's fees." Slip opinion at 4. The court concluded that "a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court. Rather, the court should make its own determination of the fees that are reasonable, giving due consideration to the appropriate factors." Slip opinion at 10. The state has requested a rehearing.

Mitchell v. City of Los Angeles, 741 F.2d 283, (9th Cir., August 24, 1984). Attorney filed suit seeking attorneys fees for the settlement of a former client's civil rights case. The district court dismissed, holding that where the attorney did not appeal the district court's order of dismissal of the underlying civil rights action, the issue of whether the court erred by accepting a settlement agreement with a stipulated waiver of fees was not properly preserved. Dkt. Nos. 82-1799, 82-1831, 83-1543.

Young v. Powell, 729 F.2d 563 (8th Cir., March 9, 1984). Following dismissal of an employment discrimination suit based upon a stipulation for dismissal, plaintiff's attorney filed an application for fees. The court ruled the motion was timely, even though filed after the order of dismissal had been entered but ruled that the settlement agreement, which settled all "disputed issues," precluded fees because attorneys fees were a disputed issue prayed for in the complaint. The Eighth Circuit affirms, noting that parties must expressly reserve attorneys fees in settlement agreements.

Toth v. UAW, ___ F.2d ___, (6th Cir., September 11, 1984). A clause in a settlement agreement resolving "all claims" without reference to attorney's fees was construed to preclude further claims for attorney's fees. The settlement agreement provided:

> "This agreement constitutes the full and complete settlement of all claims, allegations, or other causes of action which relate in any manner to the allegations set forth in Count III . . . .

National Treasury Employees v. IRS, 735 F.2d 1277 (11th Cir., July 5, 1984). In this case under the Equal Access to Justice Act, the District court determined plaintiffs were prevailing parties in a negotiated settlement in which attorney's fees were never discussed nor included in the agreement. The defendants claimed the agreement resolved all claims, including fees. The district court agreed. The Eleventh Circuit reversed, commenting:

> "As a matter of judicial efficiency, it may well be that the rule should prohibit an award of an attorney's fee for a consent decree that is silent on the point. Since the law has not developed in this area, however, a prospective rule would be more in order than a denial of fees in a case where they might otherwise be intended by the underlying policy of the EAJA." 735 F.2d at 1279.

The Circuit Court remanded for an evidentiary hearing as to whether fees were waived by plaintiffs in the agreement.

White Mountain Apache Tribe v. Williams, ___ F.2d ___, (9th Cir., February 7, 1984), Dkt. No. 81-5348. The district court invoked the Pullman abstention doctrine requiring the parties to litigate their state claims in state court. The tribe then proceeded to voluntarily litigate all their claims, both state and federal, in state court. The tribe was unsuccessful in the state courts but ultimately prevailed in the United States Supreme Court. The tribe then moved in federal court for 1988 attorneys fees and were awarded $206,012.07.

On appeal, the defendants argued that, by litigating all its claims in state court, the plaintiff had waived its right to seek attorneys fees in federal court. The Ninth Circuit held that the tribe could reserve its attorneys fees claim in these circumstances and that an express reservation was not necessary. The district court's grant of fees was, however, reversed on other grounds. See White Mountain Apache Tribe, supra, under discussion of Supremacy Clause.

Baird v. Bellotti, 724 F.2d 1032 (1st Cir., January 13, 1984). Plaintiffs were successful in a protracted civil rights case which commenced in 1974. An intervening plaintiff filed a motion for attorney's fees eight months after the Supreme Court's final decision. Plaintiff filed his motion thirty months after the decision. The district court denied both motions on grounds of laches. The First Circuit affirmed on the thirty month delay, but reversed on the eight month case.

Regarding the thirty month delay, the court found that the defendant was particularly prejudiced by the delay in that an assistant attorney general who had worked on the case quite intimately had left state service and was fully occupied in private practice. Further, the delay had eroded memories, including that of the trial judge. "We agree that loss of a participating judge's memory is another element of prejudice in a situation such as this.." 724 F.2d at 1035.

The court also concluded that the eight month delay was "unreasonable" and "unjustified." "Counsel was simply too busy to be bothered." 724 F.2d at 1035. However, the Circuit Court could not find that the delay was prejudicial. The work done for intervenors was more easily appraised and recomputed. "The eight months that went by [did not make] it significantly more difficult for the district court to appraise, or the defendant to challenge, the services said to have been performed." 724 F.2d at 1036.

IX. MISCELLANEOUS

The following 1988 cases address a variety of miscellaneous attorneys fees issues, such as whether a pro se litigant who is an attorney may qualify for fees, whether prejudgment interest on fees is allowable, and the proper forum for making fee requests.

Duncan v. Poythress, 572 F.Supp.777 (D.C.N.D Ga., October 6, 1983), on appeal to Eleventh Circuit. The District court held that a pro se litigant who is an attorney is not entitled to attorney's fees under 1988. The case is on appeal to the Eleventh Circuit. The parties are awaiting argument.

Heiar v. Crawford County, ___ F.2d ___ (7th Cir., August 20, 1984), Dkt. Nos. 83-1872, 83-2149, 83-2166, 83-31329. The Seventh Circuit adopted the body of case law which has developed under 1988 for the Age Discrimination in Employment Act of 1967.

Smith v. Detroit Board of Education, 728 F.2d 359 (6th Cir., February 29, 1984). The Sixth Circuit declined to rule on a motion for attorneys fees, holding that the district court is the appropriate forum for resolving attorney fee requests under 1988, even where the request is for fees incurred in appellate proceeding.

Wojtkowski v. Cade, 725 F.2d 127 (1st Cir., January 13, 1984). The First Circuit in this case refused to allow prejudgment interest on attorneys fees under 1988. Plaintiff argued interest was authorized by a state statute which allows for interest on the amount of damages. The Circuit court notes that 1988 does not refer to interest nor are their any other federal statutes which would so authorize. Reference is made to Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980) where postjudgment interest was allowed where there had been an unwarranted delay in payment.

Irizarry v. Quiros, 722 F.2d 869 (1st Cir., November 30, 1983). Plaintiffs were awarded double costs based upon "defendants' persistence in attempting frivolous evidentiary defenses, said costs to be charged personally against defendants' counsel." 722 F.2d at 873.

Conference of Chief Justices

PRESIDENT
W. Ward Reynoldson
Chief Justice, Supreme Court
of Iowa
State Capitol Building
Des Moines, Iowa 50319
(515) 281-5174

Secretariat
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

September 11, 1984

Honorable Orrin G. Hatch
Chairman, Subcommittee on the
Constitution
212 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

No development in recent times has aroused greater concern on the part of state judges than the United States Supreme Court's recent decison in Pulliam v. Allen (No. 82-1432). By approving an award of attorney fees against a state judicial official this opinion, in the view of the Conference of Chief Justices and the four dissenting justices in Pulliam, effectively repeals the doctrine of judicial immunity.

This is written to request that your subcommittee consider the issues raised by Pulliam in the context of the pending hearings on S. 2802, the Legal Fees Equity Act. The Pulliam decision, as you know, did not directly disturb the doctrine of absolute judicial immunity. But it did hold that the doctrine is not a bar to injunctive relief in federal civil rights (42 U.S.C. 1983) actions against a member of the state judiciary acting in a judicial capacity, or to the award of attorney fees under the Attorney Fees Award Act, 42 U.S.C. 1988. Because attorney fees can be and often are larger than damage awards in Sec. 1983 cases, we cannot view Pulliam as other than a direct threat to judicial immunity and the judicial independence it is intended to protect. State judges cannot function effectively if every judicial decision is subject to challenge in the federal courts and the legal costs that involves. Federal judges, on the other hand, suffer no such inhibitions because they are not subject to 42 U.S.C. 1983.

Implications of the Pulliam decision were discussed at length at the recent annual meeting of the Conference of Chief Justices. These discussions led to passage of the enclosed resolutions which, in their principal thrust, urge

Congress to amend 42 U.S.C. 1988 to exempt state judges and judicial officers from assessment of attorney fees in actions under Sec. 1983.

As the resolutions make clear, the Conference believes that Pulliam "strikes at the core of the entire judicial system" and that the decision was unnecessary because "adequate remedies are available within state judicial systems and the federal courts through injunctive relief without recourse to assessment of attorney fees." State judicial remedies were, in fact, available for the initial cause of action in Pulliam. In addition, the state legislature directly addressed the problem in 1981 legislation passed before the opinion came down.

The Conference's resolutions also express our deep concern about the impact of Pulliam on relations between state and federal courts because of the flood of new litigation certain to follow. In addition they call on the Conference to create a Task Force to study all the issues involved including "[t]he doctrinal foundations for the principles of judicial immunity, federalism, judicial restraint, comity, and the exhaustion of [state] remedies." The Task Force's report should be available early next year.

Pending the report, we would appreciate it if this letter and attachments could be included in any hearing record compiled in the 98th Congress on S. 2802. We also would appreciate an opportunity to present our report and testify at any hearings scheduled on the legislation in the 99th Congress.

Sincerely yours,

W Ward Reynoldson

W. Ward Reynoldson
President

WWR/nr
Enclosures
cc: Honorable Edward F. Hennessey
    President-Elect
  Honorable John A. Speziale
    Chairman, Committee on
    State-Federal Relations
  Honorable Edwin J. Peterson
    Chairman, Committee on
    Judicial Immunity
  Mr. Harry Swegle, Washington Liaison
    National Center for State Courts

RESOLUTION V

Support for Amendment of the Civil Rights Attorney Fees Awards Act, 42 U.S.C. 1988, to Exempt Judges from Assessment of Attorneys Fees in Suits for Injunctive Relief Pursuant to 42 U.S.C. 1983

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in *Pulliam v. Allen* (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees pursuant to the Attorney Fees Awards Act, 42 U.S.C. Sec. 1988; and

WHEREAS, adequate remedies are available within state judicial systems and the federal courts through injunctive relief without recourse to assessment of attorney fees; and

WHEREAS, the United States Congress should give further consideration to the impact of *Pulliam* on the judicial detachment and independence of state judges; and

WHEREAS, the United States Congress should give particular consideration to the impact of the assessment of 42 U.S.C., Sec. 1988 attorney fees on the independence of state judges and judicial officers; and

WHEREAS, the imposition of such fees against members of the judiciary strikes at the core of the entire judicial system; and

WHEREAS, the State-Federal Relations Committee and the Judicial Liability Insurance Committee of the Conference of Chief Justices have been actively involved in these issues on behalf of the Conference of Chief Justices.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices

1. Urges the United States Congress to exempt state judges and judicial officers, acting in their judicial capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;

2. Urges the Judicial Conference of the United States to initiate an early study of the exemption of state judges and judicial officers acting in their official capacities from the provisions of 42 U.S.C. Sec. 1988 and to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Adopted as proposed by the Committee on State-Federal Relations at the Conference of Chief Justices 36th Annual Meeting in Lake Ozark, Missouri on August 2, 1984.

RESOLUTION VI

Implementation of Research about the Impact of PULLIAM v. ALLEN Upon Judicial Independence, Judicial Immunity, Federalism, Judicial Restraint, Comity, Exhaustion of Remedies, Other Constitutional Principles, and Policy Consideration About the Creation of a New Class of Litigation, and the Passage of Rules or Policies for Implementation of the Principles, Particularly of Comity and Federalism

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in Pulliam v. Allen (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees under the Civil Rights Attorney Fees Awards Act (42 U.S.C. Secs. 1983 and 1988); and

WHEREAS, state judges and judicial officers are alarmed about the impact of Pulliam on the independence of state judges and judicial officers.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices name from its membership a Task Force to develop studies concerning the impact of Pulliam upon:

1. The traditional and historical policy reasons behind the principles of judicial independence and judicial detachment.

2. The doctrinal foundations for the principles of judicial immunity, federalism, judicial restraint, comity, and the exhaustion of remedies.

3. The state and federal judiciaries through creation of a new class of litigation in the federal courts against the state judiciaries.

BE IT FURTHER RESOLVED that the final report of the Task Force be brought to the attention of The Judicial Conference of the United States, The Judicial Council of each Federal Circuit, The Judicial Conference of each Federal Circuit, the State-Federal Judicial Council of each state, the American Bar Association, each state bar association, and the judicial organizations of each state; and

BE IT FURTHER RESOLVED that pending a study and report of the Task Force, that the Judicial Conference of the United States, Judicial Council of each federal circuit, the Judicial Conference of each federal circuit, and the State-Federal Judicial Council of each state be requested to consider the problems posed by Pulliam with the goal of the development of rules or policies for the application of the principles of comity and federalism in 42 U.S.C. Secs. 1983 and 1988 actions for injunctive relief and attorney fee awards against state judges and judicial officers pursuant to Pulliam.

Adopted as proposed by the Committee on State-Federal Relations at the Conference of Chief Justices 36th Annual Meeting in Lake Ozark, Missouri, on August 2, 1984.

American Enterprise Institute for Public Policy Research
1150 Seventeenth Street, N.W., Washington, D.C. 20036
(202) 862-5800

September 10, 1984

The Honorable Orrin G. Hatch
Chairman
Costitution Subcommittee
Judiciary Committee
135 Senate Russell Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We understand you are holding September 11 hearings on S. 2802 on equity in the compensation of attorneys' fees.

I enclose the following AEI publications that may be of interest to you in conjunction with those hearings:

"The Private Attorney General Industry," Regulation Magazine, May/June 1982, pp. 5-7

"Constitutional Litigation for Fun and Profit," Regulation Magazine, Jul/Aug 1980, pp. 9-10

As you know, AEI takes no position. It does seek to provide research material that will shed light on public policy issues.

Sincerely,

Russell Chapin
Director
Legislative Analyses

Encls.

Perspectives
on current developments

The Private Attorney General Industry: Doing Well by Doing Good

A good idea tends to get run into the ground. Take the idea that certain sorts of litigation against the government ought to be made easier. In the bad old days, when a federal agency went beyond its assigned powers, even persons directly affected by its actions frequently could not challenge them. If, for example, the Tennessee Valley Authority began selling electricity beyond its legally prescribed area, the private utilities that were undersold at public expense did not necessarily have standing to sue. Since they had no "right" to be free from competition, governmental or otherwise, the harm done to them was no different as a legal matter from that done to the public at large. And the public's "right" to have agencies behave in accordance with law was to be vindicated through Congress and the Executive rather than through the courts.

This view of the world changed radically during the 1940s and 1950s as Congress (and ultimately the courts, without benefit of explicit legislative mandate) set about conferring standing on new classes of litigants. Any person "adversely affected or aggrieved" was given a right to be free of unlawful agency action. The theory advanced to support the new approach was that these plaintiffs were being enlisted as "private attorneys general" to benefit the society at large by keeping the agencies in line.

After a couple of decades the thought occurs: Gee, the *public* attorney general doesn't have to dig into his own pocket to do the public's work. Why should the private attorney general? Thus there arise federal statutes in various fields compensating private litigants for their attorneys' fees when they are successful in correcting agency malfeasance.

Time goes by and another inconsistency becomes apparent: The public attorney general isn't out of pocket even when he *loses*, presumably on the theory that it benefits the public to have these things sued out even when he turns out to be on the wrong side. So why not the same for the private attorney general? Enter provisions for the award of attorneys' fees to some litigants who sue the agencies and *lose*!

The inexorable logic marches on: Come to think of it, the public attorney general is not merely compensated for his out-of-pocket expenses; he's paid a *salary* for all the benefits his litigiousness brings to the Republic. So why not the same for the private attorney general as well? Thus, the *ne plus ultra* of attorneys' fees: awards to the loser based not upon what the nominal private attorney general (the plaintiff) is charged by his lawyers, but rather upon what the real private attorney general (the lawyers themselves) *could* have charged for their services on the open market.

That this is not all a bad dream is demonstrated by several cases recently decided by the U.S. Court of Appeals for the District of Columbia Circuit. On February 5, that court awarded attorneys' fees to the losers in three cases under the Clean Air Act—which, like other environmental statutes, specifies that the court may award attorneys' fees "where appropriate." In *Sierra Club* v. *Gorsuch*, the court noted that the Sierra Club and the Environmental Defense Fund had "extended great efforts to perform their advocacy tasks well" and had assisted the court in construing the statute—even though they had lost on all counts. In *Environmental Defense Fund* v. *Environmental Protection Agency*, the court awarded fees to the Environmental Defense Fund, which had lost on eleven of the thirteen issues in the case. And in *Alabama Power Co.* v. *Gorsuch*, the court awarded fees to the Sierra Club and the Environmental Defense Fund, which had lost on about half the issues, and to the government of the District of Columbia, which had lost on the *other* half (since it had taken the opposite position).

In the second of these cases, the court awarded fees adding up to more than the Environmental Defense Fund's lawyers had actually been paid. This was in accord with a standard of "adjusted market value" that the court had adopted in *Copeland* v. *Marshall*, a 1980 employment discrimination suit brought under Title VII of the Civil Rights Act, which permits "the court, in its discretion, [to] allow the prevailing party, other than the . . . United States, a reasonable attorney's fee." (The courts have managed to interpret this, by the way, to apply only to a prevailing *plaintiff*, and not to a prevailing *defendant*.) The plaintiff, Copeland, had been represented by the prestigious Washington law firm of Wilmer, Cutler and Pickering. The court ordered the Labor Department, Copeland's employer, to promote her, and awarded her and several other plaintiffs a total of $33,000 in back pay. It then awarded her lawyers $160,000 in attorneys' fees, basing the amount not on what Copeland had agreed to pay the law firm, nor even on what the law firm actually paid its partners and associates who worked on the case, but on the "market value" of their work. This was calculated by multiplying the number of hours the attorneys had worked by the hourly rate Wilmer, Cutler and Pickering usually charged its corporate clients—plus some adjustment upward for the high quality of the service it had provided.

There is of course another rationale for the awarding of attorneys' fees against the government, quite different from the "private attorney general" concept: It might simply be thought fair to compensate the citizen for what it actually costs him to extract justice from his government. This notion is to some extent embodied in the 1980 Equal Access to Justice Act, which provides for the award of fees in administrative and court litigation against agencies by (1) individuals with less than $1,000,000 net worth and (2) companies and associations with less than 500 employees and (except for tax-exempt entities such as most public-interest law firms) less than $5,000,000 net worth. (It is a relatively stingy fee provision, containing a limitation of $75 per hour, a requirement that the person seeking the fee be the "prevailing party," and even an exception where the agency's position was "substantially justified.")

But not only will a direct personal injury not help a litigant under the more liberal fee provisions of such statutes as the Clean Air Act; it may even categorically disqualify him! In *Alabama Power Co.* v. *Gorsuch*, the D.C. circuit court suggested that it might not be "appropriate" (the statutory standard, if it can be called a standard) to award fees to those with economic motives, since the fee provisions were meant to encourage litigation by persons who would not sue otherwise. Never mind that this conclusion rests on the questionable assumption that groups like the Sierra Club will be less likely to litigate than profit-seeking corporations and loss-averse individuals for whom compliance may be cheaper than litigation. And never mind even the inverted equity of a rule that covers your costs only if you are *not* suing to obtain something of value that has been wrongfully withheld. The important point is that the effect of the rule is to establish a policy directing the flow of litigation subsidies primarily to ideologically motivated law-reform or anti-law-reform organizations.

The D.C. circuit's view on this last point may well be in accord with the statutory intent. Whether it is or not, any change in the current situation will have to be sought in Congress; and the Reagan administration proposes just that. It has submitted legislation that will limit attorneys' fees under all statutes to the level provided for in the Equal Access to Justice Act. In addition, the award would have to bear a reasonable relation to the result achieved in the case. Only winners would qualify, and the client would have to certify that the fee was owed, was determined on an arm's-length basis, and will be paid to the extent not covered by the fee award. The proposal is sure to encounter vigorous opposition from the private attorney general industry, from the smallest San Francisco legal-aid storefront to the deep-pile conference rooms of Washington law firms.

What is ultimately involved here, however, may go far beyond the "private attorney general" issue. The law governing the award of attorneys' fees in federal litigation—not only against the government but against private parties as well—is an expanding wasteland of confusion. Such chaos often accompanies the initial attempt to abandon important and long-standing legal traditions. The accelerating pace of statutory change, one suspects, has more to do with the "individual justice" rationale than the "private attorney general" rationale. In an age when corporations are tempted to describe their annual profits in multiples of annual attorney's fees instead of percentages of annual sales, the cost of obtaining justice, whether from the government or from a private party, is more often than not prohibitive. While we are not yet prepared to abandon in wholesale fashion the American rule that each party to litigation pays his own attorneys, and to adopt the English rule that loser pays all, we are gradually moving in that direction for federal claims through a disorganized and often inconsistent spate of preferential statutes. As one would expect, the earliest of these favor litigants whose causes society regards as particularly "just," or (to put it more cynically) whose numbers, cohesiveness, and political influence make the justice of their cause more readily apparent to elected officials. Civil rights claims were among the first; small business suits against agencies the most recent; and many more can be expected to follow, until the exception gobbles up the rule.

A New Deal for Utilities?

A holding company, said Will Rogers, is a "thing where you hand an accomplice the goods while the policeman searches you." For most large businesses now, it is something a lot more innocuous: a single corporate roof under which they may conveniently house all the various businesses they own or control, often in unrelated industries, without mingling their actual operations. Almost all businesses can diversify as much as they like, with or without a holding company structure. The biggest exceptions are utilities and banks, which face restrictions on both participation in holding company structures and diversification generally.

With the rise of such "near-banks" as Sears Roebuck and American Express, the banking exception may not last long. Now the utility industry too has decided that it wants to play on the same terms as everyone else. It is calling for the reform, if not the full repeal, of the Public Utility Holding Company Act of 1935, the old New Deal statute that limits the use of holding companies and confines utility diversification within very narrow bounds. And it has mustered some impressive support, including the Securities and Exchange Commission (which is responsible for enforcing the act), the Department of Energy, and a Reagan administration interagency working group studying the financial health of the electric utility industry. Moreover, while parts of the industry are seeking only to reform the act, the administration is reportedly leaning toward total repeal. Committee hearings on several repeal and reform bills are under way on Capitol Hill.

Utility holding companies date back to the 1890s, but their real heyday was the 1920s, when demand for electrical power was growing rapidly in a largely unregulated environment. By 1932, according to a Federal Trade Commission report, 78 percent of electric power and 80 percent of interstate natural gas were controlled by holding company systems. Most criticism of the holding companies focused on a few big systems — examples of the so-called Power Trust. The system operated by Samuel Insull is the classic example. Insull's empire spread across thirty-two states and included not only electric companies but ice houses, textile mills, a paper mill, and a hotel. Through "pyramiding," the layering of one holding company on top of another, Insull controlled large amounts of capital with a relatively small investment. Before it collapsed in 1929, his system was more than ten layers deep. Pyramiding was alleged to abet various financial abuses, among which were "self-dealing," in which a holding company charged exorbitant management and engineering fees to its operating companies, and "write-ups," in which it misrepresented the value of newly issued securities.

Public discontent with both the size and structure of such operations led to the Public Utility Holding Company Act of 1935. The act required all utility holding companies, defined as companies that control or own at least 10 percent of the voting securities of a gas or electric utility, to register with the SEC, to simplify their corporate structure by removing such complexities as subholding companies, and to divest themselves of all facilities outside a contiguous geographic area or region. The act also empowered the commission to regulate many of the firms' financial practices and placed restrictions on utility diversification (see below).

The more jerry-built of the utility holding companies did not withstand the Depression anyway, since their pyramid structure made even a small loss at the operating level devastat-

It also only applies when the precise defect that causes the injury is common to all items of the product in the market. Thus if—implausibly—one is injured by a design defect in a lawnmower whose manufacturer cannot be identified, the entire industry would not be liable under the *Sindell* principle unless all mowers contained precisely the same defect. The principle would also, presumably, be inapplicable in the case of a manufacturing defect that all brands in the market possess, but possess in varying degree because of varying quality control standards. The distinctive features of the DES litigation will not often recur: an absolutely standard product (there a chemical compound) that is in the public domain (so cannot be traced to a particular manufacturer or licensor) and that causes injury not because of some variable manufacturing defect but because of its very nature. Asbestos may be another example—but there are not many more. For this reason, it is not likely that *Sindell* will have substantial adverse impact upon drug or chemical innovation—which is, after all, conducted with the very objective of obtaining exclusive manufacturing and licensing rights.

Constitutional Litigation for Fun and Profit

According to a UPI dispatch of July 25, two Cuban sealift refugee families who had been in Westchester County, New York, for just over a month filed a class-action suit seeking $15,000 each in actual damages and $10,000 each in punitive damages because welfare assistance was withheld for nearly a month as a result of doubt as to whether they were legal or illegal aliens. The bill for all seventy refugee families in the county who are members of the class would come to $1.75 million. In a recent CBS Special dealing with the litigation boom in America, one of the most poignant scenes showed the old fire engine of a little town in Oregon being towed away. The town had decided to unincorporate because of the risk of high damage judgments.

There is now even more reason for municipalities not imbued with the gambling spirit to pack it in. Last April, in the case of *Owen* v. *City of Independence, Missouri*, the Supreme Court held that the Ku Klux Klan Act of 1871 (now 42 U.S.C., section 1983) renders a municipality liable in damages for action taken by its governing officers which violates an individual's constitutional rights, whether or not the violation was intentional or negligent—and indeed whether or not the constitutional right in question was even known to exist at the time. The case involved the city's failure to give a discharged employee a so-called name-clearing hearing—which requirement of the Constitution was enunciated by the Supreme Court in the *Roth* case, handed down eight weeks after the city's denial of a hearing.

The Ku Klux Klan Act is one of several post–Civil War statutes whose interpretation has been broadly expanded by the Court in recent years, and which now provide the vehicle for the making of much new constitutional law. Until a Supreme Court decision handed down in 1978, overruling an earlier case, it was not even believed that municipalities could be sued for *willful* constitutional violations under section 1983. As the four dissenters in *Owen* noted, "municipalities . . . have gone in two short years from absolute immunity under § 1983 to strict liability."

The Court's decision, which is expressly based upon the law's "evolution" to "the principle of equitable loss-spreading," will have consequences beyond the further impairment of municipal solvency. Since the new "no-fault" liability is applicable only to action approved by the municipality's governing officials, it creates an honorable incentive for elected officials to delegate responsibility to the bureaucracy. It will also increase, at least marginally, the number of novel constitutional obligations sought to be imposed upon city governments. For by eliminating the requirement of fault, it also eliminates the judicially pronounced limitation of section 1983 to rights that are "settled, indisputable law." Thus, novel rights that could previously be asserted only through injunction actions (which generally lack the lawyerly attraction of a monetary award) can now be asserted in a claim for damages—which means that it will be somewhat easier to get a contingent-fee lawyer to press them.

The reason it will only be *somewhat* easier is that, in 1976, Congress provided that, in civil rights litigation, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" (42 U.S.C., section 1988). The Supreme Court has found this language to mean that "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances" (though it has also found that a prevailing defendant cannot obtain them unless the plaintiff's claim was "frivolous, unreasonable, or groundless"). Still, under this provision the plaintiff's attorney—unless the client has money "up front"—must rely upon the court's assessment of a "reasonable" fee. The *Owen* case establishes for constitutional innovation in the municipal-law field a shot at a big cash prize that can (within broad limits) be contractually divided. Of course, we also provide more direct subsidy for constitutional litigation through the funding of public legal services organizations—and, indeed, Westchester Legal Services, Inc., was reported to have assisted in filing the Cuban refugee suit.

That litigation, by the way, came to an unexpectedly abrupt end. On July 27, UPI said that the plaintiffs had dismissed their suit, an attorney for one of them explaining that they may have misunderstood the meaning of the word "lawsuit," and that they had come to this country to "seek asylum, not to make trouble." They obviously have a lot to learn about this country—and less about its language than its mores. If litigation for the vindication of potential constitutional rights could possibly be considered to be "making trouble," we would certainly not subsidize it as indiscriminately as we do.

It is unclear whether the *Owen* opinion—or, for that matter even the earlier *Monell* opinion, which established municipal liability when there was fault—extends to county governments. Some of the language and reasoning of *Monell* would seem to. The *Owen* majority opinion places great stress upon the corporate nature of municipalities, but it is hard to believe that for the purposes of this issue the City of New York will somehow be considered less "governmental" and therefore more immune than Sullivan County.

The burden of the CBS Special alluded to earlier was that rapacious, dispute-inciting lawyers are responsible for the litigation explosion and for the disappearance of the little Oregon town, fire engine and all. One wonders whether legislative and judicial policies that foster litigation—and foster with special solicitude hyperactive constitutional innovation—are not at least equally to blame.

Motorcycles, Safety, and Freedom

In 1966 Congress authorized the withholding of 10 percent of federal highway construction funds, and 100 percent of highway safety funds, from states failing to comply with federal standards for highway safety programs. A year later a federal standard requiring mandatory motorcycle helmet use laws was issued. The states were quick to respond. The number having such laws went from zero in 1965 to forty in 1969 and forty-seven in 1975. During this same period, annual motorcycle fatalities fell by nearly 50 percent. While the drop was part of a trend that had begun in 1960, the trend accelerated significantly with the passage of motorcycle helmet laws.

In 1975 the National Highway Traffic Safety Administration began administrative proceedings against the three states that had not passed the laws. In March 1976, partially as a result of lobbying by those states and, perhaps more important, by the American Motorcyclists Association, Congress revoked the authority to cut off highway funds to states not complying with the federal motorcycle safety standards. Repeal of the mandatory helmet laws proceeded as rapidly as had their passage ten years earlier. By the end of 1979, twenty-seven states had repealed their laws or made them applicable only to persons under eighteen years of age.

The issue did not end with the 1976 revocation, however. Two years later, when it became evident that the rate of motorcycle deaths was again on the rise, Congress asked NHTSA to report on the effects of helmet law repeal. That report, issued in April 1979, concluded (1) that helmet laws encourage motorcyclists to wear helmets (nearly 100 percent of motorcyclists wear helmets in states having the laws, compared with only 50 to 60 percent in other states); (2) that helmets are effective in reducing deaths and lessening the severity of injuries, and do not significantly limit visibility or otherwise contribute to accidents; and (3) that motorcyclists and the general public favor

NIMLO
National
Institute of
Municipal
Law Officers
1000 Connecticut Avenue, N.W., Suite 800, Washington, D.C. 20036 (202) 466-5424
National Municipal Litigation Center of the National Municipal Legal Defense Fund

PRESIDENT
BENJAMIN L. BROWN
City Solicitor
Baltimore, Maryland

FIRST VICE PRESIDENT
J. LAMAR SHELLEY
City Attorney
Mesa, Arizona

SECOND VICE PRESIDENT
JOHN W. WITT
City Attorney
San Diego, California

THIRD VICE PRESIDENT
ROGER F. CUTLER
City Attorney
Salt Lake City, Utah

TREASURER
ROY D. BATES
City Attorney
Columbia, South Carolina

GENERAL COUNSEL
CHARLES S. RHYNE
Washington, D.C.

TRUSTEES:

HENRY W. UNDERHILL, JR.
City Attorney
Charlotte, North Carolina

GEORGE AGNOST
City Attorney
San Francisco, California

ROBERT J. ALFTON
City Attorney
Minneapolis, Minnesota

MARK ARONCHICK
City Solicitor
Philadelphia, Pennsylvania

JAMES K. BAKER
City Attorney
Birmingham, Alabama

MARVA JONES BROOKS
City Attorney
Atlanta, Georgia

DOUGLAS N. JEWETT
City Attorney
Seattle, Washington

JAMES P. McGUIRE
Corporation Counsel
Boston, Massachusetts

ANALESLIE MUNCY
City Attorney
Dallas, Texas

CLIFFORD D. PIERCE, JR.
City Attorney
Memphis, Tennessee

WILLIAM H. TAUBE
Corporation Counsel
Kankakee, Illinois

WILLIAM I. THORNTON, JR.
City Attorney
Durham, North Carolina

SOLICITOR GENERAL
J. LEE RANKIN

November 8, 1984

Senate Judiciary Committee
Subcommittee on Constitution
114 Russell Senate Office Building
Washington, D. C. 20510

Dear Sir or Madam:

Enclosed please find copy of a Resolution adopted at NIMLO's 49th Annual Conference, October 28-31, 1984, on Amendments to the Civil Rights Act of 1871 and the Civil Rights Attorney's Fees Awards Act of 1976.

NIMLO is a non-profit national organization serving over 1700 municipalities as an information and research center for the practice of municipal law, and the enclosed Resolution was adopted by the general assembly of NIMLO's Annual Conference.

Sincerely,

Charles S. Rhyne
General Counsel

CSR:mm

Enclosure

Midyear Seminar, April 15-17, 1984
49th Annual Conference, Ft. Worth, Texas, October 28-31, 1984

6.

AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

WHEREAS, Section 1983 (42 U.S.C. §1983), as originated in the Civil Rights Act of April 20, 1871, was enacted by Congress pursuant to §5 of the Fourteenth Amendment in order to enforce that Amendment; and

WHEREAS, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, was enacted in order to ensure that private citizens have a meaningful opportunity to vindicate, through private enforcement actions, the important policies underlying civil rights laws such as §1983; and

WHEREAS, the purpose of §1983 was extended by judicial interpretation in Maine v. Thiboutot, 448 U.S. 1 (1980), so as to permit lawsuits for violations of statutes unrelated to civil or equal rights, while almost simultaneously, any immunity defense protecting local governmental entities was rejected in Owen v. City of Independence, 445 U.S. 622 (1980); and

WHEREAS, as a result of such broad interpretation of well-meaning legislation, instances of actual violation of federally insured equal rights are being lost in a mass of creatively pleaded, frivolous or unnecessary lawsuits in which protection of rights has become secondary to the collection of attorney's fees; and

WHEREAS, the majority of these unnecessary, non-civil rights lawsuits are disposed of through nuisance-value settlements or unsuccessful litigation, but at the ultimate expense of the local, state and federal taxpayers; and

WHEREAS, the burdens placed on the courts in processing these actions and on municipal legal departments in investigating and defending against such claims are exacerbated by continuing confusion over the standards applicable to §1988 attorney's fees requests; and

WHEREAS, these problems have continued to plague governmental defendants, despite subsequent judicial attempts to clarify or narrow the potential scope of §1983 and §1988.

NOW, THEREFORE, BE IT RESOLVED that the National Institute of Municipal Law Officers fully supports legislation that would set a reasonable limit on the hourly rate for attorney's fees to be awarded under §1988 to a prevailing party similar to the rate allowed in the Equal Access to Justice Act; eliminate the use of multipliers or bonuses while establishing criteria by which courts may exercise discretion in reducing a fees award; consider the equity in requiring prevailing parties to pay a portion of their own legal expenses from any monetary judgement entered in their favor; prohibit interim fees awards and awards for services rendered subsequent to the making of a reasonable written offer of settlement that was rejected by the prevailing party; codify rules whereby a lawsuit is deemed to have been a catalyst for favorable governmental action and a fees applicant may be found to have met the burden of proof in demonstrating entitlement to an award; and provide a limitations period after resolution of the merits of a lawsuit in which a fees application must be made.

BE IT FURTHER RESOLVED, that the National Institute of Municipal Law Officers continues to support legislation which would amend §1983 by providing that municipal defendants shall have available to them a qualified immunity defense on the same terms that such a defense is available to their municipal employees, and by limiting the scope of the applicable laws defining remediable rights, privileges and immunities to laws providing for equal rights.

Office of the Salt Lake County Attorney

TED CANNON
County Attorney

June 7, 1983

Senator Orrin G. Hatch
411 Russell Senate Office Building
Washington, D.C. 20510

RE: 42 U.S.C. Section 1983

Dear Senator Hatch:

We are encountering a very critical problem in Salt Lake County regarding the assessment of attorneys fees in civil rights actions. Precisely, 42 U.S.C. Section 1983 and more commonly referred to as "1983 actions" are perceived as being vehicles for exorbitant attorneys fees by many plaintiffs counsel seeking a quick fee based oftentimes on a frivolous allegation of violation of civil rights. We are certain this is a problem nationwide.

We had a case originate in this office approximately 3 years ago involving 5 jail inmates, all women. Those detainees filed a 1983 Civil Rights Action alleging, amongst other things, jail abuse, body cavity searches, etc. Their prayers collectively in the complaint asked for damages in excess of $27,500,000.00 and other remedies. Our office successfully defended this action and zero dollars were awarded. In fact there were no damages given whatsoever. The attorneys for the complainants and the courts have always known that this office characterized the lawsuit as frivolous and without a real legal foundation. Our senior trial specialist, after several years of discovery, was able to refute most of the allegations. The only affirmative relief granted was that the jail policies were minimally revised. Counsel for the 5 women then brought a motion for attorneys fees in the amount of $36,403.50. Additionally costs in the amount of $1,736.95 were sought. Upon our vigorous objection to the amounts we asked the court, by brief, to reduce the attorney's fee awards and the court eventually ordered $27,247.50. We have had numerous other cases wherein judgments for attorneys fees in excess of $20,000-$25,000 have been awarded. We, as the taxpayers, pay despite the fact that in most of these cases the complaining parties don't receive any dollars in their pockets, and prevail in only the most limited sense in their litigation or even not at all.

231 East 4th South Salt Lake City, Utah 84111 (801) 363-7900

☐ Investigative Agency
Don Herman
Special Agent in Charge
4th Floor

☑ Administration
Roger Livingston
Chief Deputy County Attorney
4th Floor

☐ Recovery Division
Donald Sawaya, Chief Deputy
4th Floor

☐ Justice Division
John T. Nielsen, Chief Deputy
3rd Floor

☐ Civil Division
William R. Hyde, Chief Deputy
2nd Floor

We strongly urge that at the next session of Congress, you promulgate legislation that eradicates, restricts or at the least puts reasonable boundaries upon the attorneys fees to be awarded. It has even been suggested in some quarters that an appropriate response to this taxpayer rip-off would be the establishment of a national attorney agency similar to Legal Aid Offices, that would be far less expensive while yet guaranteeing adequate representation for legitimate §1983 civil rights plaintiffs.

Your attention to this matter is sincerely requested on behalf of the people of the State of Utah, the residents of this county, and the taxpayers of the nation similarly being boondoggled constantly by rapacious and unprincipled lawyers.

I would make myself and staff available to your office for further assistance including drafting of proposals, testimony before committees or in any other way you may think needful or appropriate.

Very truly yours,

Ted Cannon

TED CANNON
Salt Lake County Attorney

TC:JJK:ca

FROST & JACOBS

2500 CENTRAL TRUST CENTER
201 EAST FIFTH STREET
CINCINNATI, OHIO 45202

TELEPHONE (513) 651-6800
CABLE ADDRESS "FROSTJAC"
TELEX 21-4396 F&J CIN
TELECOPIER (513) 651-6855

MIDDLETOWN OFFICE
400 FIRST NATIONAL BANK BLDG.
MIDDLETOWN, OHIO 45042
TELEPHONE (513) 422-2001

NAPLES OFFICE
1300 THIRD STREET SOUTH
NAPLES, FLORIDA 33940
TELEPHONE (813) 261-0582

September 12, 1983

Randy Rader
Office of Senator Orrin Hatch
S.D. #212
Dirksen Senate Office Building
Senate Constitution Subcommittee
Washington, D.C. 20510

Dear Randy:

I appreciate your informing me of the activities of your committee.

I hope that the City of Cincinnati will be able to send a representative to give live testimony, or at least file written comments, in your upcoming § 1983 Civil Rights hearings. As you requested, I am enclosing a copy of an article I recently wrote concerning municipalities' civil rights and antitrust liability. It is scheduled to be published in the Federal Bar Association Journal sometime this fall.

I expect you will soon receive a letter from Jim McCarthy, Assistant to City Solicitor Richard A. Castellini, concerning the City's interest in participating in your hearings.

Best wishes.

Very truly yours,

Myron L. Dale

Myron L. Dale

MLD/br
Enclosure

MUNICIPALITIES' CIVIL RIGHTS AND ANTITRUST LIABILITY: MAY CITIES STILL GOVERN?

"A city is no different from General Motors. If it commits a wrong, it should be just as liable as anyone else."

- Robert Dinges
Attorney
Detroit, Michigan

"A city is not like General Motors. If GM gets hit with a $1 million claim, it raises the price of its cars. When the city gets hit with $1 million, it lays off ten policemen. The people are going to lose."

- William Dietrich
Assistant Corporation Counsel
City of Detroit, Michigan[1]

* * *

Widely debated over the last decade have been the numerous landmark Supreme Court decisions on such "social" issues as civil rights, abortion and the death penalty. With far less fanfare, however, the Court has authored another line of cases in recent years of equal if not greater impact.

These cases virtually strip city governments of their traditional immunity from civil rights and antitrust claims. As a consequence, local officials are paralyzed for fear of catastrophic money judgments should they misstep. Cities are scurrying to increase their insurance coverage, revamp their everyday operating procedures and beef up their legal staffs to cope with the resulting flood of litigation. Even then, those cities that govern boldly do so at their risk.

---

[1] Dragging Cities Into Court, Time Magazine, September 13, 1982, at 101, col. 2.

Congress is considering reforms. The Senate Judiciary Committee will conduct hearings this summer to examine three bills addressing an array of municipality liability issues. But the Committee's pace will be slow and in the meantime cities must move quickly to limit their exposure.

§1983: TO RIGHT ALL WRONGS

In 1871, to protect newly freed slaves, Congress enacted the first Civil Rights Act. Then referred to as the Ku Klux Klan Act and codified today as 42 U.S.C. §1983, the Act provides a cause of action for the violation under color of state law of "any rights, privileges or immunities secured by the Constitution and laws" of the United States.

Undeniably §1983 affords citizens important protections. It was enacted at a precarious time in our history when minority citizens required a reaffirmation that they too enjoyed the full protection of our laws and Constitution. The Act's sponsors, however, could not possibly have envisioned the literal and boundless application given it by three recent Court decisions that leave municipalities exposed to mammoth liability for acts entirely unrelated to racial discrimination.

In the 1978 decision of Monell v. Department of Social Services,[2] the Court held that local governments may be sued as "persons" under §1983 suits. Two years later in Owen v. City of Independence,[3] the Court denied municipalities in §1983 actions the good faith defense which is available to government officials. Finally, in Maine v. Thiboutot,[4] the Court authorized §1983 suits under not only the civil rights laws but *any* law of the United States.

Monell involved a challenge to the New York City government's policy of compulsory, unpaid maternity leave after the fifth month of pregnancy. Noting that Congress had intended a broad remedy for violations of federally-protected rights, the Court reversed its Monroe v. Pape [5] decision of 17 years earlier which had conferred on cities an absolute immunity defense.

As New York City assumed it was absolutely immune under Monroe, it did not raise in Monell the more limited, so-called good faith immunity under which city officials are immune for discretionary good faith acts in the course of their official duties.[6] The good faith immunity defense was raised and rejected two years later in Owen. The Court found the language of §1983 to be "absolute and unqualified making no mention of any privileges, immunities or defenses that may be asserted."[7] The Court had no difficulty with the anomoly of extending immunities to municipal officials but not to municipalities themselves.

---

[2] 436 U.S. 658 (1978).

[3] 445 U.S. 622 (1980).

[4] 448 U.S. 1 (1980).

[5] 365 U.S. 167 (1961).

Finally, in Thiboutot, the Court expanded the scope of §1983 beyond traditional "civil rights" to cover virtually all legal entitlements. Interpreting the unqualified language "rights and privileges secured by the Constitution and laws" to mean all federal statutes, plaintiffs' claims for Social Security Act benefits were upheld.

Monell, Owen and Thiboutot, read together with other recent §1983 decisions, erect the following standards:

---

[6] The immunities available to individuals include the absolute immunity of, for example, legislators, judges, and state prosecutors and the more limited good faith immunity of police officers, prison officials, hospital superintendents, local school board members, and governors and other state executive officials. See cases cited in CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS, §32.27 at 1070-74 (1980).

[7] 445 U.S. at 635.

(1) local governments may be held strictly liable for Constitutional violations even though they result from actions taken in good faith by government officials;

(2) state and local government officials may be held liable whenever a person has been injured through the administration of any federal-state or federal-local cooperative program, regardless of whether that program is related to civil rights;

(3) aggrieved persons may pursue claims alleging injury not only in federal courts, but also in state court; and

(4) successful plaintiffs in such cases may recover their attorney's fees from defendant officials or governments.[8]

BAD POLICY

As far as it goes, Monell is probably good law. Cities should not have an absolute, insuperable immunity whatever their conduct. Owen, however, lurches into bad reasoning and even worse public policy.

In declining to extend the immunities enjoyed by municipal officials to the municipality itself the Court's objectives are commendable:

---

[8] State and Local Liability Under 42 U.S.C. §1983, "Managing Without Immunity: The Challenge For State and Local Government Officials In the 1980's", Testimony of Thomas J. Madden Before The Senate Judiciary Committee Subcommittee on The Constitution, May 7, 1981, at p. 352.

> [T]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' Constitutional rights.[9]

However, the Court's remedy -- to strip municipalities of any immunity no matter what the circumstances -- is crude and excessive.

Two reasons are offered for the anomoly that individual municipal officials, but not municipalities themselves, have a good faith immunity. The first is that individual government officials cannot pay judgments personally that cities can pay from public funds. However, while municipalities may indeed be better able to absorb §1983 judgments, their pockets are not so deep as to warrant a standard of strict and limitless liability.

The Court's second rationale is that since the personal immunities already ensure that governmental officials vigorously perform their duties without fear of personal liability, it is therefore unnecessary to extend the same immunity to the municipalities themselves. However, it is naive to believe that city officials won't be inhibited in discharging their duties merely because a §1983 judgment cannot lie against them personally but only against the city. As Justice Powell notes in dissent:

---

[9] 445 U.S. at 651-52.

> Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will [still] be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability.[10]

In short, Owen will simply result in paralysis starting not with the individual officials but emanating from the top of municipal governments and wending its way down to the individuals that act on its behalf.

In Thiboutot, which extends §1983 relief to the denial of virtually any rights or privileges, Justice Powell again forcefully dissents. He explains that the phrase "and laws" was likely added to §1983 inadvertently when Congress consolidated its laws in 1874 and in doing so expressed no intention to expand §1983 beyond racial discrimination claims. Powell points out that had Congress intended the Act to apply to all federal laws, it would not have used the disjunctive "Constitution or laws" but rather the conjunctive "Constitution and laws".

Powell considers the reach of the majority opinion to be boundless and its implications for cities catastrophic:

---

[10] 445 U.S. at 668-69.

> In practical effect, today's decision means that state and local governments, officers and employees . . . now may face liability whenever a person believes he has been injured by the administration of any federal-state program, whether or not the program is related to equal or civil rights.
>
> ****
>
> No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial . . . [11]

Already as a result of these decisions there is evidence of sagging morale among local officials who must devote an increasing amount of their time to responding to claims and defending their actions. According to the San Diego City Attorney whose increased civil rights caseload has pushed his annual budget from less than $1 million six years ago to $4.4 million today:

> As far as disastrous judgments are concerned, we have done a pretty good job of keeping that from happening. Our big fear is not the cost of losing [a big case], although that is a possibility, but the cost of defense.[12]

The sheer magnitude of §1983 claims against municipalities is staggering. The number of §1983 suits has grown from 261 in 1961 to 25,000 in 1979.[13] Cities' exposure in §1983 suits pending as of September, 1982 was $7 billion[14] Many such claims are patently frivolous.[15] According to Kenneth Courtney, finance director of Troy, Michigan, which is trying to pay a $5.7

---

[11] 448 U.S. at 22-23.

[12] Cities Drawing Legal Fire, The National Law Journal, April 18, 1983, p. 1.

---

[13] Groszyk and Madden, Managing Without Immunity: The Challenge For State and Local Governments, PUBLIC ADMINISTRATION REVIEW, March/April, 1981 at 270, citing, Freilich, et al., 1979-1980 Annual Review of Local Government Law: Municipal Liability and Other Certain Uncertainties, 12 Urban Lawyer 577, 589 (1980).

[14] See note 1, infra.

[15] The following case synopsis was submitted to the Senate Judiciary Committee by the City of Stockton California:

CRUM vs. CITY OF STOCKTON, et al.

Plaintiff ordered steak and eggs in a restaurant and refused to pay after eating about half the steak, the eggs, toast and coffee. He complained he was given the wrong type steak. The innkeeper called police and signed citizen's arrest form. Innkeeper failed to keep appointment and sign formal complaint for DA and plaintiff was released.

Plaintiff brought suit against City alleging false arrest even though Penal Code immunized City and agents from false arrest claim based on citizen's arrest. City summary judgment granted.

Plaintiff conceded he had no cause of action based on false arrest, but he filed amended complaint again alleging false arrest and adding negligence in that officers failed to preserve evidence (half eaten steak) which plaintiff contended would have proven civil liability of innkeeper in separate cause of action filed against that party. City demurrer sustained based on res judicata (false arrest) and no cause of action existed (preservation of evidence for civil liability between parties).

Plaintiff appealled on both counts against the City. The Court of Appeals, in a published opinion, affirmed judgment. The Appellate Court noted plaintiff's concession that he had no cause of action against City based on false arrest and rejected contention law enforcement personnel had a duty to anticipate civil litigation and preserve evidence such as in this case. . . . [Continued on next page] million award, "Everybody and his brother is suing the city. They feel that they are going to get easy money."[16]

A more damaging effect of these three decisions will be to dilute local government's effectiveness. There exists an imbalance in Federal government program management now that federal agencies enjoy far greater sovereign immunity than state or local governments. Local officials will be reluctant to administer federal assistance programs beyond what they are minimally compelled to do. Efforts to return government functions to those levels closest to the people will surely suffer.[17]

---

[15] [Continued from previous page] On January 31, 1980, Plaintiff filed his next Complaint in which he alleged violation of 42 U.S.C. §1983 in the Superior Court of California, County of San Joaquin again alleging false arrest, failure to preserve evidence, in addition to the deprivation of constitutional rights . . .

The City's motion for judgment on the pleadings was granted after about 46 minutes of argument in Superior Court. This exceptionally frivolous example of §1983 litigation allowed a plaintiff to keep the City in court from November 23, 1977 until September 3, 1980." Hearings before The Subcommittee On The Constitution of The Committee On The Judiciary, United States Senate, On S. 584, S. 585 and S. 990, Municipal Liability Under 42 U.S.C. 1983, May 6, 7, July 8 and 23, 1981, pp. 176-77.

[16] See note 12, supra.

[17] See note 8, supra, at pp. 352-55.

THE LOSS OF ANTITRUST IMMUNITY

Portending just as much uncertainty and vulnerability for municipalities as the recent §1983 decisions is the Court's decision last term in Community Communications Co. v. City of Boulder,[18] in which the Court eradicates the so-called "state action" antitrust immunity for home rule cities and narrows it substantially for all others.[19]

The loss of antitrust immunity may in fact be even more threatening to cities than their increased civil rights exposure. While §1983 affords relief for Constitutional and statutory infractions, loss of the state action immunity puts cities at risk not just for activity which is otherwise illegal but also for actions which are at the very heart of local government's functions and which promote public health, safety and welfare.

The state action doctrine originated in Parker v. Brown,[20] in which a raisin producer challenged a state program setting production limits and fixing the wholesale price of raisins. The Court clearly understood that the scheme would have constituted illegal price-fixing under the Sherman Act had it been established by private persons. Recognizing, however, California's substantial involvement in the regulatory program, the Court reasoned that the Sherman Act "must be taken to be a prohibition of individual and not state action."[21] Finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers . . . from activities directed by its legislature," the program was upheld.[22]

---

[18] 455 U.S. 40 (1982).

[19] See, generally, Dale, M., Boulder's Far-Reaching Impact: An Impediment to Home Rule?, The National Law Journal, March 29, 1982, at 32, 34.

[20] 317 U.S. 341 (1943).

The Parker state action doctrine is grounded in the principle of federalism -- that ours is a dual system of government in which the states too are sovereign and must be accomodated in the enforcement of federal statutes such as the Sherman Act.

Parker lay dormant for more than 20 years until six recent Surpeme Court decisions, culminating in Boulder, substantially narrowed it.

Goldfarb, Cantor and Bates [23] forged the concept that in order to gain immunity, anticompetitive activity must be compelled by the state acting as sovereign rather than merely prompted, approved or acquiesced in by the state. In City of Lafayette,[24] the Court held this immunity also available to muncipalities since though the concept of federalism accomodates only states and not cities, a state naturally might choose to implement its policies through the use of its cities and towns. It held therefore that a municipality would receive Parker immunity if its conduct was "pursuant to a state policy to displace competition with regulation or monopoly public service." Id., at 413. This state policy would have to be "clearly articulated and affirmatively expressed." Id., at 410. Midcal added the additional requirement that the anticompetitive practices must also be "actively supervised" by the state.[25]

---

[21] Id. at 352.

[22] Id. at 350-51.

[23] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

Boulder was brought by the holder of a nonexclusive franchise from the City of Boulder to operate a local cable television system. The firm had traditionally provided cable TV service to a discrete portion of the city in which, for geographic reasons, broadcast television signals could not be received. Due to recently developed satellite technology, it was later able to broaden its service into the remaining areas of the city.

---

[24] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

[25] California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

This same technology, however, was also available to potential competitors, one of which announced its interest in obtaining a permit to provide competing cable television service. Concerned that a cable system could easily become a natural monopoly and perceiving that the existing firm had an unfair advantage since it was already operating, the Boulder City Council issued ordinances creating an emergency 90-day moratorium on any expansion of service.

The central issue before the Boulder Court then, was whether the city's ordinances, solely by virtue of the city's "home rule" status, met the state action exemption criteria under either the Parker or the City of Lafayette standards. That is, did the ordinance constitute either (1) the action of the State of Colorado itself (and thus satisfy Parker) or (2) municipal action in furtherance of clearly articulated and affirmatively expressed state policy (thus satisfying City of Lafayette)?

Boulder's argument under the Parker standard was that because the Home Rule Amendment vests in the City of Boulder, every power in local and municipal affairs previously held by the legislature, the city's cable television moratorium ordinance was in essence an act of the State. The Court easily dismissed this rationale. It had held almost a century earlier that all sovereign authority in the United States resided either with "the Government of the United States or [with] the States of the Union. There exists within the broad domain of sovereignty but these two."[26] City of Lafayette held again that municipalities "are not themselves sovereign."[27]

The Court gave equally short shrift to the City's second argument that the Colorado Home Rule Amendment's "guarantee of local autonomy" constitutes "clear articulation and affirmative expression" in favor of the moratorium ordinance, under City of Lafayette:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive . . .. Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances -- would wholly eviscerate the concepts of clear articulation and affirmative expression that our precedents require.[28]

BOULDER'S SHOCKWAVES

The Boulder majority suggests that it really breaks no new ground. It has merely treated municipalities as it does all others under the antitrust laws and does not prejudge the eventual liability of the municipalities nor speculate as to appropriate penalties.[29] Justice Rehnquist's dissenting opinion, however, exposes the truly radical reach of the Court's decision whereby municipalities are no more immune from antitrust liability than are private parties.

---

[26] U.S. v. Kogama, 118 U.S. 375, 379 (1886).

[27] 435 U.S. at 412.

[28] 455 U.S. at 55.

First, home rule municipalities are now confronted with a Hobson's choice. On the one hand, their conduct may violate the antitrust laws unless specifically formulated and supervised by the state. On the other hand, state involvement in municipal affairs is precisely the antithesis of home rule government.

Second, despite the majority's incantation that it does not prejudge the issue of liability, the dissent further illustrates certain obvious difficulties the Court will face in dealing with it:

> [We have held] that private entities may defend [trade] restraints only on the basis that the restraint is not unreasonable in its effect on competition or because its procompetitive effects outweigh its anticompetitive effects . . . Applying [this rule] to municipalities would mean that an ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects. A local government would be disabled from displacing competition with regulation. Thus, a municipality would violate the Sherman Act by enacting restrictive zoning ordinances, by requiring business and occupational licenses, and by granting exclusive franchises to utility services even if the city determined that it would be in the best interests of its inhabitants to displace competition with regulation.[30]

---

[29] *Id.* at 58-60 (Stevens, J., concurring).

[30] *Id.* at 66.

To the dissenters, the decision "radically alter[s] the relationship" between states and cities, "effectively destroys the 'home rule' movement in this country" and will "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act."31/

Cities have already faced a multitude of suits, and occasional staggering judgments, in such areas of municipal regulation as zoning and land development, occupational licensing, cable television licensing, hospital certification, and business licensing.32/ Immunity has been denied cities for allegedly discriminating in the provision of services by utilities, municipal hospitals, ambulances, taxi and towing services, garbage disposal, airport car rental authorities, parking lots, golf

---

31/ *Id.* at 60, 71.

32/ R. Rappaport, Antitrust Litigation Involving Local Governmental Bodies, ALI-ABA Course of Study, Potential Liability of Local Governments under Federal Antitrust and Civil Rights Laws, citing, *e.g.*, *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded* in light of *City of Lafayette*, *reinstated per curiam*, 576 F.2d 696 (5th Cir. 1978); *Brown v. Carr*, 1980 - Trade Cas. (CCH) ¶63,033 (D.D.C. 1979) (zoning and land development); *E.G.*, *boulder*, *supra*; *Affiliated Capital Corporation v. City of Houston*, 519 F.Supp. 991 (S.D. Tex. 1981) (cable television licensing); *E.G.*, *Grendel's Den Inc. v. Goodwin*, 495 F.Supp. 761 (D. Mass. 1980), *rev'd on other grounds*, 662 F.2d 88 (1st Cir.) *aff'd*, 662 F.2d 102 (1st Cir. 1981) (licensing).

courses and sports arenas.[33] In the area of procurement, municipalities have been denied immunity for discriminatory bid procedures and vendor selection.[34]

As with §1983 cases, just as damaging as the risk of loss is the cost of defense. Cities will continually be hailed into federal court to justify their decisions that competition be replaced with regulation.

Though it is the very function of local government to make choices that may exclude third parties, Boulder invites litigation by the losers of such choices. If, for example, a city authorizes only one concessionaire at a stadium and is sued by a losing bidder, the municipality would not be able to defeat the suit at its threshold by invoking the state action doctrine but would be put to defend on the merits.

---

[33] Id., citing, e.g., City of Lafayette, supra; City of Fairfax v. Fairfax Hospital Association, 562 F.2d 280 (4th Cir. 19779), vacated and remanded in light of City of Lafayette, 598 F.2d 835 (4th Cir. 1979); Professional Ambulance Service, Inc. v. Blackstone, 35 Conn Supp. 136 400 A.2d 031 (1978); Garbage Collection Agreement, 62 Op. Atty. Gen. 741 (1979); Woolen v. Surtran Taxicabs Inc., 461 F.Supp. 1025 (N.D. Tex. 1978); Kendrick v. City Council of Augusta, 516 F.Supp. 1134 (S.D. Ga. 1981); In re Airport Car Rental Antitrust Litigation, 521 F.Supp. 568 (N.D. Cal 1981); Corey v. Look, 641 F.2d 32 (1st Cir. 1981); Kurek v. Pleasure Driveway and Park District of Peoria, 557 F.2d 580 (7th Cir. 1977), vacated and remanded for reconsideration in light of City of Lafayette, reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); Duke & Company, Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975).

[34] Id., citing, e.g., City of Atlanta v. Ashland-Warren, Inc., 1982-1 Trade Cas. (CCH) ¶64,527 (N.D. Ga. 1981).

Moreover, its substantive defenses are now sharply limited. The municipality would be required to prove, for example, that its choice of one concessionaire to the exclusion of plaintiff is somehow pro-competitive; or that even if its choice did exclude plaintiff, he was not significantly injured as a result; or that its action of licensing a concessionaire was strictly unilateral and therefore not actionable as an illegal "contract, combination or conspiracy" under Sec. 1 of the Sherman Act.[35]

The effect of Boulder can only be to chill municipalities' willingness to govern. Cities will be forced back to their sponsors, the state legislatures, for ad hoc, piecemeal authority to grapple with local problems once thought to be presumptively within their domain.

PROSPECTS FOR REFORM

Judicial relief for municipalities is unlikely, at least from this Court. The Monell, Owen and Thiboutot civil rights decisions all note that the Court is unalterably bound by the express language of §1983 and it is therefore up to Congress to rewrite the Act.[36] As for antitrust relief, it too is not likely since the majority in *Boulder* has staked out territory from which it will be impossible to retreat with any intellectual consistency.

---

[35] 15 U.S.C. §1.

It is just as unlikely municipalities can secure protection from federal and state executive branches. While federal programs could conceivably institute a more pervasive and rigid set of requirements so as to minimize local officials' discretion and thus their legal exposure, the degree of federal involvement necessary to cloak local officials with the federal government's sovereign immunity would be difficult to achieve.[37] Thus, for example, in *U.S. v. Orleans*, a unanimous Court held that a non-profit recipient of federal assistance was not an immunized agent of the United States, "the test being not whether the. . .agency receives federal money and must comply with federal standards and regulations, but whether its *daily operations are supervised by the federal government*." (Emphasis added.)[38]

---

[36] *Monell*, 436 U.S. at 695; 445 U.S. at 635; *Thiboutot*, 448 U.S. at 8: "Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of §1983."

[37] Groszyk and Madden, *Managing Without Immunity: The Challenge For State and Local Governments*, PUBLIC ADMINISTRATION REVIEW, March/April 1981, at 273-74.

[38] 425 U.S. 807, 815 (1976).

Moreover, federal and state executive branch involvement is not only unlikely but also undesirable. It would thwart the decentralized administration and flexible, local application of programs that is most favored by program recipients and administrators alike.

Legislative action, then, may be the only effective relief. The recent §1983 decisions and Boulder have mobilized municipalities and their policy and trade associations to work Capitol Hill feverishly this past term.[39] In response, Senator Hatch of Utah has introduced S. 584 which would reverse Thiboutot by limiting the "and laws" language to laws "providing for equal rights," and also S. 585 which would reverse Owen by conferring good faith immunity to political subdivisions of the States. Senator Mathias of Maryland has filed S. 990 entitled the "Civil Rights Improvement Act," a more comprehensive reworking of the procedural and substantive standards under §1983.

One approach which has not yet found its way into legislation is to place a monetary limit on the damage recoveries available under §1983. Such a ceiling might be, for example, $50,000 exclusive of medical fees.40/ Some states already have laws on the books limiting the amount of damages plaintiffs can collect in actions against cities.41/

---

[39] Remarks of Alan Parker, Staff Counsel, House Judiciary Committee, before the 18th Annual Symposium on Trade Association Law & Practice of the Bar Association of the District of Columbia (February 24, 1982).

Alternatively, Congress might exempt altogether certain areas where damages are likely to be very high, leaving injured parties only injunctive relief Another strategy would be to institute federal indemnification similar to that under the Price-Anderson Act covering accidents at nuclear power facilities, whereby any liability above a fixed limit is borne by the federal government.42/

In the antitrust area, legislation might erect the same good faith immunity defense which exists in the civil rights area for municipal officials (and would be extended to the municipalities themselves under S. 585). Legislation might also create for municipalities an exception to the general rule of agency law that principals (here, cities) are liable merely when their agents

---

40/ Statement of Prof. Charles Abernathy Before The Senate Judiciary Committee Subcommittee on the Constitution, May 6, 1981, at p. 28.

41/ *See* note 12, *infra* at 2, col. 1.

42/ *See* note 37, *infra* at 274.

(city employees) act with apparent authority.[43] This exception might provide instead that a municipality is liable only when its agent also acts with the intent of benefitting the city and there is clear evidence of the city's ratification or authorization of its employee's activities.

Until such reforms are made, however, municipalities would be well advised to establish antitrust compliance programs. They have been instituted in private industry over the last ten years and have been very successful in ferreting out anticompetitive conduct. While the existence of an antitrust compliance program does not of course create an exemption from the antitrust laws, courts have viewed them most favorably in drafting jury instructions and in sentencing.[44] Such programs generally provide for dissemination to employees of a written synopsis of the antitrust laws, the use of compliance checklists, the institution of a document retention program, and periodic antitrust audits (file reviews, personnel interviews, etc.) generally conducted by outside counsel.45/

---

[43] See, American Society of Mechanical Engineers v. Hydrolevel Corp., 72 L.Ed. 330 (1982).

[44] For example, in the Corrugated Container case in Houston, Judge Singleton instructed the jury that in determining whether or not a corporation had an anticompetitive intent, it may consider whether the corporation "acted deligently in the promulgation, dissemination and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law." See, "Corporate Antitrust Compliance Programs - Justice View", 5 CCH Trade Reg. Rptr. ¶ 50,403, at 55,899.

* * *

We face today a difficult accomodation between the need to deter illegal government activities and compensate victims of such activities, and the need for local government to meet problems creatively and free of the spectre of liability. The Supreme Court has unsuccessfully grappled with these competing needs. As municipalities now face crippling exposure under the civil rights and antitrust laws, the scales are out of balance. Congress should move quickly to right them, in a careful manner to be sure, but right them nonetheless so that city governments may get on with the business of governing.

45/ See, e.g., Anderson, Effective Antitrust Compliance Programs and Procedures, 18 THE BUSINESS LAWYER 739 (1963); Lipson, How to Implement an Antitrust Compliance Program, 17 THE PRACTIAL LAWYER 39 (Dec. 1971).

LAW OFFICES
ANCEL, GLINK, DIAMOND, MURPHY & COPE, P.C.
180 NORTH LA SALLE STREET
CHICAGO, ILLINOIS 60601
312 / 782-7606

LOUIS ANCEL
MARVIN J. GLINK
STEWART H. DIAMOND
JOSEPH A. MURPHY
RONALD S. COPE
PETER M. ROSENTHAL
JOHN B. MURPHEY

ROBERT E. GRUNDIN
PETER D. COBLENTZ
KATHERINE S. JANEGA
HENRY E. MUELLER
STEVEN A. STENDER
DAVID W. OTT
CARY SCHWIMMER
SUSAN L. KURLAND
ROBERT K. BUSH
PETER M. BARRON
BARBARA A. ADAMS

DAVID LINCOLN ADER
OF COUNSEL

November 2, 1984

Senator Orrin Hatch
Room 135
Russell Building
Washington, D.C. 20510

Dear Senator Hatch:

Enclosed please find a copy of a presentation that I made last week to the National Institute of Municipal Law Officers at their conference in Fort Worth, Texas. As you can see the presentation deals with the ongoing problem of attorney's fees in civil rights cases. You will recall that I testified in front of your Committee concerning this matter in 1981. The problem has not gotten any better and certainly much worse by the sheer numbers of cases pending. I would hope that you will be able to move this matter through Congress early in the new session so that we can get some of the relief that we truly need.

You can be assured that you have our continued support in this matter and we will continue to contact our individual Senators and Representatives to urge their support.

Kindest regards.

Sincerely,

MARVIN J. GLINK

MJG/cd
enclosure

CC: Charles S. Rhyne
NIMLO

CIVIL RIGHTS ATTORNEYS' FEES--
WHAT DOES A CITY PAY FOR?

I. INTRODUCTION.

WHEN IT DECIDED HENSLEY V. ECKERHART, _____U.S._____, 103 S.CT. 1933 (1983), THE SUPREME COURT EMPHASIZED THAT A "REQUEST FOR ATTORNEY'S FEES SHOULD NOT RESULT IN A SECOND MAJOR LITIGATION." ID. AT 1941. IN THE 18 MONTHS SINCE HENSLEY WAS DECIDED, HOWEVER, A GREAT DEAL OF LITIGATION HAS RESULTED OVER THE SCOPE AND EXTENT OF MUNICIPAL LIABILITY FOR FEES UNDER 42 U.S.C. §1988. AND OF COURSE IT IS NO SECRET THAT CIVIL RIGHTS CLAIMS--AND THE RESULTING FEE PETITIONS--HAVE RISEN DRAMATICALLY. AS THE MISSOURI ATTORNEY GENERAL RECENTLY EMPHASIZED DURING CONGRESSIONAL HEARINGS, NOW THAT THE GOVERNMENT IS PAYING FOR LITIGATION, IT IS OBTAINING IT IN DROVES.

FORTUNATELY, THERE ARE A FEW FEDERAL JUDGES WHO ARE WILLING TO CONDEMN THE ABUSE OF THE CIVIL RIGHTS ACT AND THE LIABILITY FOR FEES UNDER §1988. JUDGE CHARLES P. KOCORAS, OF THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, IS ONE OF THOSE JUDGES. IN A RECENT CASE OF OURS, NEWMAN V. VILLAGE OF HINSDALE, _____F.SUPP._____, (N.D. ILL 1984 - 84 C 2616), HE STATED:

> ONLY AFTER 1976, WHEN CONGRESS PASSED A LAW THAT VIRTUALLY GUARANTEED A PLAINTIFF AN AWARD OF ATTORNEY'S FEES IF HE MANAGED TO "PREVAIL" IN A CIVIL RIGHTS CASE, DID LAWSUITS LIKE THIS BECOME NOT ONLY THINKABLE BUT COMMON PLACE. WITH AN ASSURANCE THAT THEIR FEES WOULD BE PAID BY THE DEFENDANT IF THEIR CLIENT "PREVAILED" IN ANY WAY, INCLUDING SETTLEMENT OF A BOGUS SUIT FOR ITS NUISANCE VALUE, AND WITH NO APPRECIABLE DOWNSIDE (LOSING PLAINTIFFS ALMOST NEVER HAVE TO PAY A VICTORIOUS DEFENDANT'S FEES UNDER THE STATUTE), LAWYERS FLOCKED TO THE FEDERAL COURTS TO FILE "CIVIL RIGHTS" CASES.
>
> * * *THE CONSTITUTION HAS BEEN DEBAUCHED AS LAWYERS, "NOT OVERLY HINDERED BY THE COURTS," HAVE ENDEAVORED TO TRANSFORM EVEN THE MOST PETTY COMPLAINTS AGAINST LOCAL GOVERNMENTS INTO FEDERAL CASES OF CONSTITUTIONAL DIMENSION. * * * WHEN EVERY MISSTEP BY GOVERNMENT, NO MATTER HOW SLIGHT, IS SEIZED UPON AS CREATING A CAUSE OF ACTION ENTITLING ITS HOLDER TO A CHANCE AT RECEIVING A CASH JACKPOT FROM A FEDERAL JURY, PLUS AN AWARD OF ATTORNEY'S FEES AS AN AUTOMATIC BONUS, IMPORTANT VALUES ARE LOST AND THE CONSTITUTION COMES TO BE LOOKED UPON AS A SORT OF LOTTERY TICKET.

IN A FOOTNOTE, JUDGE KOCORAS POINTS OUT THAT THE NUMBER OF PAGES OF ANNOTATIONS OF §1983 CASES IN THE U.S.C.A. ANNOTATED HAS RISEN FROM 56 PAGES IN 1957 TO A STAGGERING 1364 PAGES TODAY.

MUNICIPAL FEE LIABILITY IS A REALITY. ACCORDINGLY, THIS PAPER WILL DISCUSS A FEW OF THE MORE SIGNIFICANT CASES DECIDED SINCE HENSLEY WHICH FLESH OUT SOME OF THE PRINCIPLES I OUTLINED TO YOU AT LAST YEAR'S CONFERENCE. I WILL FOCUS ON THOSE CASES WHICH EXPLAIN THE TWO CRITICAL HENSLEY FACTORS OF REASONABLE RATE AND REASONABLE HOURS. THESE CASES WILL, HOPEFULLY, PROVIDE SOME GUIDELINES FOR DETERMINING HOW MUCH A MUNICIPALITY MUST PAY A PREVAILING PLAINTIFF UNDER §1983.

II. THE REASONABLE RATE.

THIS PAST TERM, THE COURT ANSWERED SOME OF THE QUESTIONS WHICH REMAINED OPEN FOLLOWING HENSLEY. IN BLUM V. STENSON, 104 S.CT. 1541 (1984), THE COURT REVIEWED A FEE REQUEST SUBMITTED BY THE NOT-FOR-PROFIT LEGAL AID SOCIETY. FINDING THAT LEGAL AID'S NON-PROFIT STATUS DID NOT LIMIT ITS RIGHT TO A FULL FEE RECOVERY UNDER §1988, THE COURT HELD THAT FEE AWARDS ARE TO BE CALCULATED ACCORDING TO "THE PREVAILING MARKET RATES IN THE RELEVANT COMMUNITY, REGARDLESS OF WHETHER PLAINTIFF IS REPRESENTED BY PRIVATE OR NON-PROFIT COUNSEL." JUSTICE POWELL'S OPINION FURTHER DEFINED THIS CONCEPT:

> ...THE REQUESTED RATES ARE IN LINE WITH THOSE PREVAILING IN THE COMMUNITY FOR SIMILAR SERVICES BY LAWYERS OF REASONABLY COMPARABLE SKILL EXPERIENCE AND REPUTATION.

THE COURT CONCEDED THAT DETERMINING AN APPROPRIATE "MARKET RATE" FOR LEGAL SERVICES IS INHERENTLY DIFFICULT, AND EMPHASIZED THAT THE BURDEN WAS ON THE FEE APPLICANT TO PRODUCE SATISFACTORY EVIDENCE "IN ADDITION TO THE ATTORNEY'S OWN AFFIDAVITS" AS TO THE REASONABLENESS OF THOSE RATES. INTERESTINGLY, AT LEAST ONE COURT SINCE BLUM HAS CAUTIONED REGARDING THE USE OF STEREOTYPED AFFIDAVITS IN SUPPORT OF A FEE REQUEST, STATING THAT "THERE IS A DANGER THAT LAWYERS WHO SIGN SUCH AFFIDAVITS WILL EXAGGERATE THEIR BILLING RATES IN ORDER TO ESTABLISH A PRECEDENT THAT MAY HELP THEM SOME DAY--PERHAPS EVEN IN ORDER TO TRY TO RAISE THE MARKET PRICE OF LEGAL SERVICES." HENRY V. WEBERMEIER, 738 F.2D 188 (7TH CIR. 1984).

THE BLUM RESULT WAS CORRECTLY ANTICIPATED IN THE 10TH CIRCUIT'S EN BANC OPINION IN COOPER V. SINGER, 719 F.2D 1496 (10TH CIR. 1983). IN COOPER, THE PANEL HELD THAT A CONTINGENT FEE AGREEMENT EXECUTED BY A CIVIL RIGHTS PLAINTIFF AND HIS ATTORNEY DOES NOT LIMIT THE AMOUNT OF THAT PLAINTIFF'S (OR REALLY, THE ATTORNEY'S) §1988 FEE RECOVERY. COOPER ALSO INDICATES THAT THIS RULE IS POTENTIALLY A DOUBLE-EDGED SWORD. HOLDING THAT IF THE CLIENT'S §1988 FEE AWARD IS LESS THAN THE AMOUNT OWED TO THE ATTORNEY UNDER THE CONTINGENT FEE AGREEMENT, "THEN THE LAWYER WILL BE EXPECTED TO REDUCE HIS FEE TO THE AMOUNT AWARDED BY THE COURTS."

BLUM ANSWERED SOME, BUT NOT ALL, OF THE QUESTIONS RELATING TO A PREVAILING PLAINTIFF'S ENTITLEMENT TO AN ENHANCEMENT OR "MULTIPLIER" OF THE LODESTAR. THE COURT HELD FIRST, THAT PLAINTIFFS WERE NOT ENTITLED TO A FEE AWARD INCREASE BECAUSE THE LITIGATION WAS NOVEL AND COMPLEX, FINDING THAT IN SUCH A CASE, THE "SPECIAL SKILL AND EXPERIENCE OF COUNSEL SHOULD BE REFLECTED IN THE REASONABLENESS OF THE HOURLY RATES. NEITHER THE COMPLEXITY OR THE NOVELTY OF THE ISSUES, THEREFORE, IS AN APPROPRIATE FACTOR IN DETERMINING WHETHER TO INCREASE THE BASIC FEE AWARD."

THE BLUM COURT TWICE EMPHASIZED THAT AN UPWARD ADJUSTMENT IN THE PRESUMPTIVELY REASONABLE FEE OF RATE TIMES HOURS IS APPROPRIATE ONLY IN THE "RARE CASE," AND ADJUSTMENT DUE TO THE "QUALITY" OF LEGAL REPRESENTATION IS JUSTIFIED ONLY IN THE RARE CASE WHERE THE FEE APPLICANT OFFERS SPECIFIC EVIDENCE TO SHOW THAT THE QUALITY OF SERVICE RENDERED BY THE APPLICANT WAS SUPERIOR TO WHAT

ONE COULD REASONABLY EXPECT IN LIGHT OF THE HOURLY RATES CHARGED AND IN LIGHT OF "EXCEPTIONAL" SUCCESS.

FINALLY, THE COURT DECLINED TO CONSIDER WHETHER THE "RISKINESS" OF THE LITIGATION, I.E., THE RISK OF NOT BEING THE PREVAILING PARTY, MAY EVER JUSTIFY AN UPWARD FEE ADJUSTMENT. JUSTICES BRENNAN AND MARSHALL'S CONCURRING OPINION EMPHASIZED THEIR VIEW THAT "IT IS NECESSARY TO ACCOUNT FOR THIS RISK IN FEE AWARDS...EITHER BY INCREASING THE APPROPRIATE HOURLY RATE OR BY ENHANCING THE FEE OTHERWISE CALCUALTED WITH THE USE OF AN HOURLY RATE THAT DOES NOT REFLECT THE RISK OF NOT PREVAILING.

IN AN INTERESTING CASE DECIDED AFTER *BLUM*, THE EIGHTH CIRCUIT ALLOWED A 25% ENHANCEMENT OF THE FEES INCURRED BY AN ATTORNEY FOR PLAINTIFF IN AN EMPLOYMENT DISCRIMINATION ACTION DURING THE APPEALS PROCESS. IN *CRAIK V. MINNESOTA STATE UNIVERSITY BOARD*, 738 F.2D 348 (8TH CIR. 1984), THE COURT FOUND THAT THE COMPLEXITY AND RISKINESS DID JUSTIFY AN ENHANCEMENT:

> ...COUNSEL FOR PLAINTIFFS UNDERTOOK THIS CASE WHICH THEY MUST HAVE KNOWN WOULD REQUIRE A MASSIVE EXPENDITURE OF TIME AND ENERGY IN THE FACE OF THE VERY REAL POSSIBILITY THAT NO FEE AT ALL WOULD BE OBTAINED. THE RISK HERE WENT BEYOND THE NORMAL CONTINGENT-FEE SITUATION. IN [ONE ATTORNEY'S] CASE FOR EXAMPLE, SUBSTANTIALLY ALL OF HIS PROFESSIONAL TIME BETWEEN DECEMBER, 1982, AND JUNE, 1983, WAS SPENT ON THIS APPEAL. THE INVESTMENT OF THAT MUCH TIME ONE ONE'S LAW PRACTICE WITH NO REAL HOPE OF COMPENSATION IF THE APPEAL SHOULD PROVE UNSUCCESSFUL IS INDEED A MAJOR RISK, ONE THAT WE THINK SHOULD BE TAKEN INTO ACCOUNT IN SETTING A REASONABLE FEE. IN OUR OPINION, AN ENHANCEMENT OF 25%...IS APPROPRIATE.... THE USE OF PERCENTAGES IN THIS CONNECTION IS, OF COURSE, SOMEWHAT ARBITRARY. THE JUDGMENTS MADE HERE ARE LARGELY QUALITATIVE. THE ATTEMPT TO EXPRESS THEM MATHEMATICALLY INEVITABLY GIVES A DELUSIVE APPEARANCE OF EXACTNESS.

THE LATEST CASE TO CONSIDER ENHANCEMENT IS LAFFEY V. NORTHWEST AIRLINES, INC., NO. 83-1838, (CA DC 9/28/84) 53 LW 2181. IN THIS CASE, THE DISTRICT COURT AWARDED $3,469,829.49 BY DOUBLING THE "LODESTAR" TO ACCOUNT FOR THE RISK PREMIUM. THE COURT ALSO REJECTED THE ARGUMENT THAT THE ATTORNEYS SHOULD BE RESTRICTED TO THEIR OWN MARKET RATES INSTEAD OF THE "PREVAILING MARKET RATES" AND STATED IT MUST FRAME AN AWARD THAT REFLECTS THE "TRUE VALUE" OF THE SERVICES RENDERED. THE COURT OF APPEALS REVERSED ON THE POINT OF USING THE "PREVAILING MARKET RATE" STATING THAT PROCEEDING PRESUMPTIVELY WITH THE FIRM'S OWN RATES ALLOWS THE COURT TO AVOID THE ESSENTIALLY IMPOSSIBLE TASK OF SELECTING ONE RATE OVER ANOTHER FROM A WIDE RANGE OF "MARKET RATES." FURTHER, IT LIMITS THE POWER OF THE TRIAL COURT ARBITRARILY TO AWARD OR PUNISH ATTORNEYS BY SETTING RATES VIRTUALLY AT WILL, AND IT ALLOWS THE PARTIES IN THE COURT TO AVOID A "SECOND MAJOR LITIGATION" OVER THE RATEMAKING PROCESS. THE LAFFEY COURT ALSO REJECTED THE MULTIPLIER BASED UPON PLAINTIFF'S CHANCE OF SUCCESS AS BEING CONTRARY TO CONGRESSIONAL INTENT. THE COURT STATED THAT AN UPWARD FEE ADJUSTMENT TO COMPENSATE FOR THE RISK OF LOSING, IF EVER APPROPRIATE, IS PERMISSIBLE ONLY IN AN EXCEPTIONAL CASE.

III. ELEMENTS OF COSTS.

RECENT DECISIONS HAVE ALSO FOCUSED ON WHAT ELEMENTS OF COSTS BEYOND THOSE RECOVERABLE PURSUANT TO 28 U.S.C. §1920 MUST BE REIMBURSED BY A MUNICIPALITY TO A PREVAILING PLAINTIFF. IN THE HENRY CASE, SUPRA, THE COURT ENGAGED IN AN EXTENSIVE ECONOMIC ANALYSIS OF MANY OF THESE FACTORS. FIRST, THE COURT NOTED THAT "THE CASE LAW OVERWHELMINGLY SUPPORTS THE PROPOSITION THAT 'ATTORNEY'S FEE' INCLUDE OUT-OF-POCKET EXPENSES IN PREPARATION FOR TRIAL." SINCE §1988 IS DESIGNED TO SHIFT THE COST OF THE WINNING PARTY'S LAWYER TO THE LOSING PARTY, THE PREVAILING PLAINTIFF IS ENTITLED TO HIS ATTORNEY'S OUT-OF-POCKET EXPENSES "FOR WHICH LAWYERS NORMALLY BILL THEIR CLIENTS SEPARATELY." THUS, A PREVAILING PLAINTIFF IS ENTITLED TO RECOVER ALL REASONABLY NECESSARY EXPENSE ITEMS THAT ARE NOT INCLUDED IN A LAWYER'S OVERHEAD, AND WHICH ARE TYPICALLY BILLED SEPARATELY. A FEW EXAMPLES:

(1) THERE CAN BE NO RECOVERY FOR LOCAL CALLS, BUT A PARTY MAY RECOVER LONG-DISTANCE CALLS.

(2) SECRETARIAL EXPENSES ARE INCLUDED IN OVERHEAD AND ARE NOT RECOVERABLE, BUT EXPENSES OF WORD PROCESSING AND COMPUTER RESEARCH WHICH ARE OFTEN BILLED SEPARATELY MAY BE RECOVERABLE.

(3) LIKEWISE, THE PARTY IS ENTITLED TO RECOVER FOR TRAVEL TIME "BILLED AT THE SAME HOURLY RATE AS THE LAWYER'S NORMAL WORKING TIME." IN A RECENT DISTRICT COURT CASE, GRENDEL'S DEN V. LARKIN, 582 F.SUPP. 1220 (D. MASS, 1984), THE COURT HELD THAT A PREVAILING PLAINTIFF WAS ENTITLED TO REIMBURSEMENT FOR HOTEL AND GROUND TRANSPORTATION WHILE IN WASHINGTON TO ARGUE THE CASE BEFORE THE SUPREME COURT. THE COURT ALSO ALLOWED RECOVERY FOR THE SUPREME COURT BRIEF PRINTING COSTS, EVEN THOUGH PLAINTIFF NEVER PETITIONED TO RECOVER THOSE COSTS IN THE SUPREME COURT.

(4) THERE IS A CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF RECOVERY FOR PARALEGAL AND LAW CLERK SERVICE. SOME COURTS HAVE HELD THAT SUCH CHARGES ARE A PART OF OVERHEAD, AND HENCE NOT RECOVERABLE. JONES V. ARMSTRONG CORK CO., 630 F.2D 324 (5TH CIR. 1980); LANPHERE V. BROWN UNIVERSITY, 610 F.2D 46, 48 (1ST CIR. 1979). OTHERS HAVE HELD THAT SUCH CHARGES SHOULD BE SEPARATELY RECOVERABLE, SINCE TO DO OTHERWISE COULD RESULT IN MORE EXPENSIVE ATTORNEYS' TIME BEING EXPENDED FOR TASKS THAT COULD OTHERWISE BE PERFORMED BY A CLERK OR PARALEGAL. CAMEO CONVALESCENT CENTER, INC. V. SENN, 738 F.2D 836 (7TH CIR. 1984); LAFFEY V. NORTHWEST AIRLINES, 572 F.SUPP. 354 (D.C. 1983); RAMOS V. LAMM, 713 F.2D 546 (10TH CIR. 1983); RICHARDSON V. BYRD, 709 F.2D 1016 (5TH CIR. 1983);

BERMAN V. SCHWEIKER, 531 F.SUPP. 1149, 1154 (N.D. ILL. 1982); ROSS V. SALTMARSH, 521 F.SUPP. 753, 769 (S.D. N.Y. 1981).

(5) OTHER COURTS HAVE HELD THAT SUCH ITEMS AS EXPERT WITNESS FEES ARE RECOVERABLE, CONSISTENT WITH "THE OBJECT OF JUDICIAL FEE DETERMINATION... TO STIMULATE THE RESULTS THAT WOULD OBTAIN IF THE LAWYER WERE DEALING WITH A PAYING CLIENT...." HENRY.

IV. REASONABLE HOURS AND REDUCTIONS.

ANOTHER THORNY AREA LEFT IN THE WAKE OF HENSLEY IS THE DETERMINATION OF THE TOTAL HOURS FOR WHICH THE APPLICANT IS ENTITLED TO COMPENSATION. UNDER HENSLEY, IF PLAINTIFF HAS SUCCEEDED ON SOME OF HIS CLAIMS FOR RELIEF, HE MAY RECOVER FEES FOR TIME SPENT ON "DISTINCTLY DIFFERENT CLAIMS FOR RELIEF THAT ARE BASED ON DIFFERENT FACTS AND LEGAL THEORIES...." THEREFORE, THE FIRST STEP IS TO DETERMINE WHETHER VARIOUS CLAIMS IN THE UNDERLYING LAWSUIT WERE RELATED OR UNRELATED FOR FEE RECOVERY PURPOSES. UNDER ONE ANALYSIS, "AN UNSUCCESSFUL CLAIM WILL BE UNRELATED TO A SUCCESSFUL CLAIMWHEN THE RELIEF SOUGHT ON THE UNSUCCESSFUL CLAIM IS INTENDED TO REMEDY A COURSE OF CONDUCT ENTIRELY DISTINCT AND SEPARATE FROM THE COURSE OF CONDUCT THAT GAVE RISE TO THE INJURY UPON WHICH THE RELIEF GRANTED IS PREMISED." MARY BETH G. V. CITY OF CHICAGO, 723 F.2D 1263 (7TH CIR. 1983).

THE *MARY BETH G.* CASE OFFERS A GOOD ILLUSTRATION OF THIS DIVISION. PLAINTIFF BROUGHT FALSE ARREST AND EXCESSIVE FORCE CLAIMS AGAINST TWO POLICE OFFICERS, AND ALSO SUED THE CITY AND OTHER OFFICERS AS A RESULT OF A STRIP SEARCH THAT OCCURRED FOLLOWING THE ARREST. SHE DID NOT PREVAIL ON THE FALSE ARREST AND EXCESSIVE FORCE CLAIMS, AND ACCORDINGLY, THE COURT FOUND "BECAUSE THE RELIEF REQUESTED ON [THESE] CLAIMS CORRESPONDS TO COURSES OF CONDUCT 'DISTINCTLY DIFFERENT' FROM THAT RELATING TO THE STRIP SEARCH CLAIM, THE HOURS SPENT ON THESE UNSUCCESSFUL CLAIMS MUST BE EXCLUDED IN CONSIDERING THE AMOUNT OF A REASONABLE ATTORNEY'S FEE." ID. AT 1280. WITH RESPECT TO THE STRIP SEARCH CLAIM, THE COURT APPROVED A FEE AWARD FOR ALL TIME SPENT ON THAT CLAIM, EVEN THOUGH PLAINTIFFS PREVAILED ONLY AGAINST THE CITY AND NOT AGAINST THE INDIVIDUAL DEFENDANTS, HOLDING:

> WE HOLD THAT WHEN, AS HERE, A PLAINTIFF RAISES A CLAIM FOR RELIEF THAT RELATES TO SEVERAL DEFENDANTS, NOT ALL OF WHOM ARE HELD LIABLE, THE TOTAL TIME EXPENDED ON THE CLAIM FOR RELIEF SHOULD BE COUNTED IN AWARDING A PALINTIFF ATTORNEYS' FEES, SO LONG AS THE DEFENDANTS FROM WHOM PLAINTIFF DID NOT OBTAIN RELIEF, WERE NOT NAMED FRIVOLOUSLY. 1281.

THE EIGHTH CIRCUIT HAS DEVOTED ATTENTION IN A NUMBER OF CASES TO THE ISSUE OF THE EXCESSIVENESS OF FEE PETITIONS IN RELATION TO THE RESULTS OBTAINED. IN *JACQUETTE V. BLACKHAWK COUNTY*, 710 F.2D 455 (8TH CIR. 1983), PLAINTIFF'S ATTORNEYS SPENT OVER 1000 HOURS LITIGATING AN EMPLOYMENT DISMISSAL-DUE PROCESS CLAIM, THAT WAS ULTIMATELY SETTLED FOR $1,500 AND AN

AGREEMENT BY THE DEFENDANT TO PROVIDE A NEUTRAL EMPLOYMENT REFERENCE. THE COURT AFFIRMED THE DISTRICT COURT'S OPINION SHARPLY REDUCING THE FEE REQUEST.

IN FAST V. SCHOOL DISTRICT OF CITY OF LADUE, 728 F.2D 1030 (8TH CIR. 1984), ANOTHER EMPLOYMENT CASE, THE COURT HELD THAT A FINDING THAT PLAINTIFF WAS ENTITLED TO A POST-TERMINATION HEARING (WHICH SHE DID NOT BOTHER TO AVAIL HERSELF OF) MEANT THAT SHE WAS A PREVAILING PARTY FOR PURPOSES OF A FEE AWARD. THE COURT DID REMAND, HOWEVER, FOR A DETERMINATION ON THE ISSUE OF EXCESSIVENESS. THERE WAS A SHARP DISSENT FROM THIS RULING BY THREE JUDGES ON THE EN BANC PANEL.

FINALLY, IN PERKINS V. CROSS, 728 F.2D 1099 (8TH CIR. 1984), SIX PICKETERS BROUGHT FIRST AMENDMENT CLAIMS AGAINST MUNICIPAL OFFICIALS. ONLY TWO OF THE SIX PREVAILED, AND WERE AWARDED $100 EACH NOMINAL DAMAGES. ALL CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF WERE ALSO DENIED. THE COURT HELD FIRST THAT NO AWARD SHOULD BE MADE FOR THE TIME THE ATTORNEYS SPENT ON BEHALF OF THE FOUR PLAINTIFFS WHOSE CLAIMS WERE DISMISSED. AS TO THE TWO PREVAILING PARTIES, THE COURT REMANDED FOR A DETERMINATION WHETHER THEY ACHIEVED A LEVEL OF SUCCESS THAT MAKES THE HOURS REASONABLY EXPENDED A SATISFACTORY BASIS FOR MAKING A FEE AWARD.

IN A RECENT DISTRICT COURT FEE DECISION ARISING OUT OF THE VARIOUS CHICAGO STRIP SEARCH CASES, THE COURT SHARPLY REDUCED A FEE PETITION ON THE EXCESSIVENESS ISSUE. THE COURT HELD:

> (1) THAT SINCE THIS WAS A SINGLE INCIDENT CASE, WHOSE FACTS DID NOT NEED A TEAM APPROACH TO MANAGE EITHER THE EVIDENTIARY PREPARATION OR ANY DOCUMENTS, THE HOURS CLAIMED FOR A SECOND-CHAIR COUNSEL WERE NOT RECOVERABLE;
>
> (2) THAT HOURS REFLECTING DUPLICATION OF EFFORTS WERE TO BE CARVED FROM THE FEE REQUEST;
>
> (3) THAT WHERE A PREMIUM WAS CHARGED FOR TRIAL TIME, THAT PREMIUM SHOULD NOT EXTEND TO HOURS SPENT TAKING DEPOSITIONS;
>
> (4) THAT A $70-$95 PER HOUR RATE FOR A SECOND YEAR PRACTIONER WAS EXCESSIVE;
>
> (5) THAT THE TIME SPENT BY COUNSEL CONFERRING WITH OTHER LAWYERS INVOLVED IN STRIP-SEARCH CASES, ATTENDING OTHER TRIALS, ETC., WERE NOT RECOVERABLE;
>
> (6) THAT HOURS SPENT BY A SECOND BACK-UP LAWYER WHO SUBSTITUTED FOR A FIRST BACK-UP LAWYER IN GETTING UP TO SPEED WERE NOT COMPENSABLE;
>
> (7) THAT HOURS SPENT AT TRIAL ATTEMPTING TO RECOVER FOR "LESS-THAN-SPECIOUS" LOSS OF INCOME CLAIMED WERE NOT COMPENSABLE;

> (8) THAT FAR TOO MUCH TIME WAS SPENT ON PREPARATION OF JURY INSTRUCTIONS. IN THIS RESPECT, THE COURT NOTED THAT THE MUNICIPAL OPPONENT "SHOULD NOT BE REQUIRED TO PAY FOR SELF-EDUCATION OF THE PLAINTIFF'S ATTORNEYS." ROE V. CITY OF CHICAGO, 586 F.SUPP. 513 (N.D. ILL. 1984).

SEE ALSO, HARMON V. SAN DIEGO COUNTY, 736 F.2D 1329 (9TH CIR. 1984), HOLDING THAT A DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT ANY HOURS SPENT IN EXCESS OF 200 WERE UNREASONABLE IN LIGHT OF THE RESULTS OBTAINED.

FINALLY, CARE SHOULD BE GIVEN IN A SETTLEMENT CONTEXT (ESPECIALLY IN CASES INVOLVING NON-MONETARY RELIEF) TO DETERMINE WHETHER THE LITIGATION CAN FAIRLY BE SAID TO HAVE CAUSED THE RESULTS. SEE ILLINOIS WELFARE RIGHTS ORGANIZATION, ET AL., V. MILLER, 723 F.2D 564 (7TH CIR. 1983); B&J MUSIC V. MCAULIFFE, 719 F.2D 1536 (11TH CIR. 1983).

V. CONCLUSION.

In conclusion, it should be reemphasized that the potential liability for municipalities under §1988 is serious, significant and may often outstrip the award in the underlying litigation. As emphasized by the Eighth Circuit in the Fast case, the unfortunate reality is that municipal defendants may have a larger obligation to their clients "to attempt to negotiate a reasonable settlement as quickly as possible. Otherwise...where the defendant insists on litigating all the way down the line, it may end up paying the fees for both sides, even though it has lost only a small part of the contest of the merits of the plaintiff's claim." But it is critical for municipal attorneys to keep emphasizing that plaintiffs have a concommitant responsibility and obligation to proceed reasonably and in good faith. If a client declines the reasonable settlement offer, and then succeeds only marginly at trial, Hensley and its progeny do provide a basis for declining an award of substantial attorneys' fees.

The battle is still being waged in Congress. Hopefully, after the national elections we will see some movement. There is opposition to Senator Hatch's proposed legislation. The Legal Fees Equity Act would set a limit of $75 an hour on fees awarded in civil and administrative proceedings, eliminate multipliers and bonuses, require the "prevailing Party" to seek

RELIEF THAT IS "SIGNIFICANT" AND NOT MERELY OF "SOME BENEFIT", AND DENY FEES FOR LEGAL WORK DONE AFTER A SETTLEMENT OFFER IS MADE THAT TURNS OUT TO BE LARGER THAN A SUBSEQUENT JUDGMENT. THE LATEST ABA JOURNAL, OCTOBER, 1984, VOLUME 70, PAGE 16 ET SEQ., PROVIDES SENATOR HATCH'S ARGUMENTS ALONG WITH THE ARGUMENTS OF THE EXECUTIVE DIRECTOR OF THE ALLIANCE FOR JUSTICE. THE LATTER ORGANIZATION IS OPPOSED TO ANY CAP ON FEE AWARDS. I URGE ALL OF YOU TO RESPOND TO THIS ARTICLE IN ANY WAY YOU CAN AND TO SEND COPIES OF YOUR RESPONSES TO SENATOR HATCH. NIMLO COLLECTIVELY MUST FIGHT TO GET THIS LEGISLATION THROUGH CONGRESS, EVEN THOUGH IT'S NOT ALL WE WANT.

No. 83-1437

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI AND
LAWRENCE RHODE, PETITIONERS

v.

ALFRED W. CHESNY, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF
STEVEN CHESNY, DECEASED

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN B. KUHL
Deputy Assistant Attorney General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ROBERT S. GREENSPAN
BARBARA S. WOODALL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff rejects a pre-trial offer of judgment and then obtains a less favorable final judgment, the plaintiff "must pay the costs incurred after the making of the offer." The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, provides that in certain enumerated actions the court may award the prevailing party "a reasonable attorney's fee as part of the costs." Against this background, the United States will address the following question:

Whether a plaintiff who rejects a Rule 68 offer of judgment that is more favorable to the plaintiff than the judgment finally obtained may shift to the defendant, under 42 U.S.C. (Supp. V) 1988, the attorneys' fees incurred by the plaintiff after the making of the defendant's more favorable offer of judgment.

TABLE OF CONTENTS

Page

Interest of the United States 1

Summary of argument 2

Argument:

A plaintiff who rejects a Rule 68 offer of judgment and then obtains a less favorable final judgment may not shift his post-offer attorneys' fees to the defendant under 42 U.S.C. (Supp. V) 1988 6

I. Settled principles of statutory construction require that the definition of attorneys' fees "as part of the costs" in 42 U.S.C. (Supp. V) 1988 be harmonized with the language of Fed. R. Civ. P. 68 6

II. The court of appeals erred in rejecting the "logical" approach to harmonizing Rule 68 and Section 1988 14

A. The policies underlying both Section 1988 and Rule 68 require limiting a plaintiff's attorneys' fee award to fees incurred before the making of the defendant's offer of judgment 14

B. Construing "costs" under Rule 68 as encompassing attorneys' fees under Section 1988 does not render Rule 68 invalid under the Rules Enabling Act 22

Conclusion 29

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 20

Allen v. *McCurry*, 449 U.S. 90 16

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 .... 7, 11, 12, 14, 15, 27

Cases—Continued: Page

Banks v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 ... 9
Brennan v. *Silvergate District Lodge No. 50*, 503 F.2d 800 ... 26, 28
Burns v. *Alcala*, 420 U.S. 575 ... 9
Califano v. *Yamasaki*, 442 U.S. 682 ... 28
Colautti v. *Franklin*, 439 U.S. 379 ... 9
Copeland v. *Marshall*, 641 F.2d 880 ... 22
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 ... 8, 12, 14, 16, 17, 18, 20, 21
Erie R.R. v. *Tompkins*, 304 U.S. 64 ... 5, 23, 24, 26
Fulps v. *City of Springfield*, 715 F.2d 1088 ... 8, 9
General Motors Corp. Engine Interchange Litigation, In re, 594 F.2d 1106, cert. denied, 444 U.S. 870 ... 28
General Telephone Co. v. *Falcon*, 457 U.S. 147 ... 15
Guaranty Trust Co. v. *York*, 326 U.S. 99 ... 24
H.F.G. Co. v. *Pioneer Pub. Co.*, 162 F.2d 536 ... 28
Hanna v. *Plumer*, 380 U.S. 460 ... 5, 24, 25, 28
Helms v. *Richmond Petersburg Turnpike Auth.*, 52 F.R.D. 530 ... 28
Hensley v. *Eckerhart*, No. 81-1244 (May 16, 1983) ... 2, 4, 21, 22
Hutto v. *Finney*, 437 U.S. 678 ... 3, 7, 9, 10, 13, 27
Kremer v. *Chemical Constr. Corp.*, 456 U.S. 461 ... 15-16, 29
Maher v. *Gagne*, 448 U.S. 122 ... 20
Margulis v. *Solomon & Berck Co.*, 223 A.D. 234, 229 N.Y.S. 157 ... 7
Migra v. *Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984) ... 15
Mississippi Publishing Corp. v. *Murphree*, 326 U.S. 438 ... 23, 24
Morris-Turner Live Stock Co. v. *Director Gen. of Railroads*, 266 F. 600 ... 7
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 ... 17
New York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54 ... 27
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 ... 29
Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 ... 23, 24

Cases—Continued: Page

Roadway Express, Inc. v. *Piper*, 447 U.S. 752 .... 7, 9, 10, 12
Scheriff v. *Beck*, 452 F. Supp. 1254 9
Sibbach v. *Wilson & Co.*, 312 U.S. 1 ...... 5, 21, 23-24, 25, 27
Smith v. *Robinson*, No. 82-2120 (July 5, 1984) 22
Sprague v. *Ticonic National Bank*, 307 U.S. 161 27
St. Martin Evangelical Lutheran Church v. *South Dakota*, 451 U.S. 772 29
Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 26
United States v. *Gustin-Bacon Division*, 426 F.2d 539, cert. denied, 400 U.S. 832 .... 26, 27, 28
Vocca v. *Playboy Hotel of Chicago, Inc.*, 686 F.2d 605 22
Walker v. *Armco Steel Corp.*, 446 U.S. 740 .... 24, 25
Washington-Southern Navigation Co. v. *Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629 27
Waters v. *Heublein, Inc.*, 485 F. Supp. 110 .... 8-9, 17
Watkins v. *W.E. Neiler Co.*, 135 Minn. 343, 160 N.W. 864 7
Wayman v. *Southard*, 23 U.S. (10 Wheat.) 1 27
Weiss v. *Temporary Investment Fund, Inc.*, 692 F.2d 928 28
White v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 .... 3, 7, 27

Constitution, statutes and rules:

U.S. Const. Amend. XI 9
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-5(k) 2, 7, 11
Clayton (Anti-Trust) Act, 15 U.S.C. 15 .... 11, 13
Communications Act, 47 U.S.C. 206 11
Copyright Act of 1909, 17 U.S.C. 505 (formerly codified at 17 U.S.C. 40) 11, 13
Interstate Commerce Act, 49 U.S.C. 1 *et seq.*:
    49 U.S.C. 8 .... 11, 13
    49 U.S.C. 16 .... 11, 13
    49 U.S.C. 908 .... 11, 13
Railway Labor Act, 45 U.S.C. 153 .... 11, 13
Rules Enabling Act, 28 U.S.C. 2072 .... 4, 5, 14, 22, 23, 24, 25, 26, 27

Constitution, statutes and rules—Continued:	Page
Securities Act of 1933, 15 U.S.C. 77k(e)	11, 13
Securities Exchange Act of 1934, 15 U.S.C. 77(a) *et seq.*:	
15 U.S.C. 78i(e)	11, 13
15 U.S.C. 78r(a)	11, 13
The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988	*passim*
Trust Indenture Act of 1939, 15 U.S.C. 77ooo(e)	11
28 U.S.C. 1738	15
28 U.S.C. 1920	7
28 U.S.C. 1927	7, 9
2 Minn. Stat. § 9323 (Mason 1927)	6-7
4 Mont. Codes Ann. § 9770 (1935)	7
N.Y. C.P.A. § 177 (1937)	7
Fed. R. Civ. P.:	
Rule 1	18
Rule 3	24
Rule 23	15
Rule 68	*passim*
advisory committee note, 28 U.S.C. App. at 637	7, 18
Miscellaneous:	
ABA, *Rules of Civil Procedure for the District Courts of the United States* (1938)	7
Awarding of Attorneys' Fees: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975)	16
Burbank, *The Rules Enabling Act*, 130 U. Pa. L. Rev. 1015 (1982)	26
78 Cong. Rec. (1934):	
p. 9363	26
p. 10866	26
122 Cong. Rec. (1976):	
p. 31473	16
p. 31474	16
p. 31830	16
p. 31832	16, 18
p. 31834	17

Miscellaneous—Continued:	Page
H.R. Rep. 1829, 73d Cong., 2d Sess. (1934)	26
H.R. Rep. 94-1558, 94th Cong., 2d Sess. (1976)	10, 15, 17, 18
S. 759, 70th Cong., 1st Sess. (1928)	26
S. 477, 69th Cong., 1st Sess. (1926)	26
S. Rep. 440 (Pt. 2), 70th Cong., 1st Sess. (1928)	26
S. Rep. 1049, 73d Cong., 2d Sess. (1934)	26
S. Rep. 1174, 69th Cong., 1st Sess. (1926)	26
S. Rep. 94-1011, 94th Cong., 2d Sess. (1976)	10, 12, 15, 16, 17, 20
Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974)	23, 24, 25
Goodhart, *Costs*, 38 Yale L.J. 849 (1929)	13
R. Jackson, *The Struggle For Judicial Supremacy* (1941)	26
7 (Pt. 2) J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* (2d ed. 1984)	26, 27-28
Note, Delta Air Lines, Inc. v. August: *The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604 (1982)	17
Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889	10
Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976: Source Book* (Comm. Print 1976)	10-11
12 C. Wright & A. Miller, *Federal Practice and Procedure* (1973)	18
19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* (1982)	28

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND
LAWRENCE RHODE, PETITIONERS

v.

ALFRED W. CHESNY, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF
STEVEN CHESNY, DECEASED

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the important question whether attorneys' fees, which are statutorily defined as "part of the costs" in The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, are among the "costs" encompassed by Rule 68 of the Federal Rules of Civil Procedure for purposes of determining a plaintiff's liability for his own attorneys' fees when the plaintiff rejects an offer of judgment under Rule 68 but later obtains a final judgment less favorable than the offer. The issue arises because, under Rule 68, such a plaintiff is liable for "the costs incurred" after the offer is made.

The United States has a substantial interest in the resolution of this issue. The decision of the court below, holding that civil rights plaintiffs may recover post-offer attorneys' fees even if the final judgment they obtain is less favorable than the Rule 68 offer they rejected, significantly impairs the effectiveness of Rule 68 as a tool for encouraging settlements and avoiding protracted litigation. Accordingly, the decision may well result in an unnecessary increase in the workload of the already overburdened federal courts. In addition, as a defendant, the United States may face potential liability for attorneys' fees under a host of fee-shifting statutes (most notably, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k)) that, like Section 1988, specifically define attorneys' fees "as part of the costs."

The United States makes regular use of Rule 68 generally and in civil rights litigation in particular. Civil rights cases are expensive to take to trial; they may involve many witnesses and thousands of documents. See *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983), slip op. 11-12. At the same time, the realistic value of the claims asserted is often relatively small, notwithstanding the frequent inclusion of rather extravagant claims for relief. In appropriate cases, therefore, the United States makes a reasonable offer of judgment. Such offers are made not only to avoid needless litigation but also to ensure that the government will not be required to pay the plaintiff's attorneys' fees (which often far exceed the plaintiff's damages) if the plaintiff prevails on some aspect of his claim. Incorporation of Section 1988's definition of "costs" into Rule 68 (which does not itself define "costs") would serve the important purpose of relieving defendants of the burden of plaintiffs' attorneys' fees for continued litigation that produces no additional benefits. But if plaintiffs are assured that they will recover attorneys' fees even if they reject reasonable offers and ultimately obtain less favorable judgments, there will be very little incentive for plaintiffs to accept reasonable settlement offers. Accordingly, the United States joins petitioners in urging reversal of the decision below.

SUMMARY OF ARGUMENT

Notwithstanding Section 1988's definition of attorneys' fees as "part of the costs," the court of appeals held that a civil rights plaintiff who obtains a less favorable final judgment than the Rule 68 offer he rejects is entitled to recover his post-offer attorneys' fees from the defendant. The facts of this case vividly demonstrate the anomalous result that flows from such a ruling. Petitioners made an obviously reasonable offer of judgment to settle this case for $100,000, which would have compensated respondent for his pre-offer attorneys' fees of $32,000 and $68,000 in damages. Respondent rejected that offer and then ran up additional attorneys' fees of $171,000 to secure a jury verdict of $60,000—a net *loss* to respondent of $8,000. To require petitioners to pay $171,000 in post-offer fees incurred solely because of respondent's unreasonable failure to accept a favorable settlement is contrary to elementary principles of fairness.

The law does not require such an inequitable result. The court of appeals' decision conflicts with the plain meaning of Rule 68 and Section 1988 and rests on erroneous policy considerations. Rule 68 and Section 1988 can be easily harmonized to produce a result that is faithful to the purposes of the statute and the rule and fair to both parties.

I. Because Rule 68 does not define "costs," it is appropriate to look to Congress's definition of that term in the underlying statute. Section 1988 expressly includes attorneys' fees as "part of the costs." Thus, although the traditional understanding of "costs" might not ordinarily include attorneys' fees, here Congress has exercised its unquestioned authority to define fees as costs, and that determination is binding on the courts. See, *e.g.*, *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 449 n.7 (1982); *Hutto* v. *Finney*, 437 U.S. 678, 693-697 (1978).

Moreover, the plain language of Section 1988 is no accident. Contrary to the court of appeals' assumption, the contemporaneous understanding of the term "costs" at the time of Rule 68's promulgation in 1938 clearly included attorneys' fees. By 1938, Congress had enacted numerous statutes—encompassing much of the major legislation of the period—that defined attorneys' fees "as part of the costs," and it has continued to do so with ever-increasing frequency. See App., *infra*, 1a-6a. The substantial number of statutes affected, coupled with the rule that courts must defer to Congress's definition of costs and attorneys' fees, compels a reading of Rule 68 and Section 1988 that harmonizes the language of each.

II. Although the court of appeals acknowledged that a plain meaning analysis would be "logical" (Pet. App. A8), it rejected that approach based on its understanding of the policies behind Section 1988 and its view that the Rules Enabling Act, 28 U.S.C. 2072, prohibits interpreting Rule 68 costs as encompassing attorneys' fees under Section 1988. The court erred in both respects.

A. Holding a plaintiff responsible for his own post-offer attorneys' fees does not "cut[] against the grain of section 1988" (Pet. App. A8). While it is undoubtedly true that the primary purpose of Section 1988 was to encourage the bringing of meritorious civil rights actions, Congress never intended Section 1988 to override all competing policies. Rather, fee awards under Section 1988 must be "reasonable." Here, respondent seeks to charge petitioners with $171,000 in post-offer attorneys' fees for work that produced no additional benefits; on the contrary, that work resulted in a jury verdict $8,000 less than petitioners' offer. In these circumstances, it would be "unreasonable," and thus contrary to Section 1988, to reward respondent for his mistake in judgment.

In addition, the lower court's decision is inconsistent with this Court's approach to Section 1988 as set forth in *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983). There, the Court stressed that the amount of fees recoverable under Section 1988 depends, to a very large extent, on the degree of success obtained. It is quite obvious that a plaintiff who rejects a reasonable offer of judgment and then obtains a less favorable final judgment has not achieved any success whatsoever attributable to his post-offer efforts, and it would be contrary to the teaching of *Hensley* to reward such a plaintiff with his post-offer attorneys' fees.

Congress's concern with imposing reasonable limits on fee awards under Section 1988 demonstrates that there is ample room for harmonizing the policies of that Section with other provisions of law, including Rule 68. Rule 68 was intended to encourage settlements and thereby avoid unnecessary litigation; it also incorporates elementary principles of fairness to defendants, who should not be saddled with a plaintiff's unnecessary litigation expenses. Indeed, the goals of Rule 68 and Section 1988 are virtually identical—to create an incentive structure that will encourage meritorious and discourage pointless litigation. The court of appeals thus erred in elevating its single-minded perception of Section 1988's purposes over the more balanced approach intended by Congress.

B. Concluding that the "right" to attorneys' fees under Section 1988 is "substantive," the court below also held that an interpretation of Rule 68 costs that includes attorneys' fees would run afoul of the Rules Enabling Act, 28 U.S.C. 2072, which provides that the federal rules may not alter any "substantive right." The court rested its conclusion on the substance/procedure dichotomy originally formulated by this Court in diversity cases, in the immediate wake of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). See, *e.g.*, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). Even in diversity cases, however, the Court long ago abandoned that approach as a test for determining the validity of a federal rule. See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 469-474 (1965). And the test has *never* been applied in non-diversity cases such as this one, where the concern is not displacement of state substantive law, but rather the allocation of authority between Congress and this Court. Thus, the only relevant inquiries are whether the Constitution permits Congress to delegate to the Court authority to promulgate the particular rule in question (an issue not here in dispute), and, if so, whether Congress has exercised its authority to supersede the rule promulgated by the Court.

The federal rules have the force of statutes, there is a strong presumption in favor of their validity, and there is no indication whatsoever, much less the necessary clear evidence, that Congress intended an implied, partial repeal of Rule 68 when it enacted Section 1988. Thus, the Rules Enabling Act presents no obstacle to the ordinary operation of Rule 68 in this case.

ARGUMENT

A PLAINTIFF WHO REJECTS A RULE 68 OFFER OF JUDGMENT AND THEN OBTAINS A LESS FAVORABLE FINAL JUDGMENT MAY NOT SHIFT HIS POST-OFFER ATTORNEYS' FEES TO THE DEFENDANT UNDER 42 U.S.C. (SUPP. V) 1988

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, provides that in certain enumerated actions the court may award the prevailing party "a reasonable attorney's fee *as part of the costs*" (emphasis added). Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff rejects a pre-trial offer of judgment and then obtains a less favorable final judgment, the plaintiff "must pay the costs incurred after the making of the offer." The issue in this case is whether such a plaintiff may rely on Section 1988 to shift his own post-offer attorneys' fees to the defendant. In our submission, fee-shifting in these circumstances is barred by elementary principles of statutory construction as well as by sound reasons of policy.

I. Settled Principles Of Statutory Construction Require That The Definition Of Attorneys' Fees "As Part Of The Costs" In 42 U.S.C. (Supp. V) 1988 Be Harmonized With The Language Of Fed. R. Civ. P. 68

A. Neither the language nor the history of Rule 68 defines "costs."[1] Accordingly, one must look elsewhere to ascertain the items encompassed by the term "costs" as it is used in the rule. Ordinarily, it might be proper to look to the traditional understanding of costs. But when Congress has specified a particular meaning for "costs," Congress's definition must control. See *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 449 n.7 (1982) (emphasis added) ("*Unless so defined by statute*, attorney's fees are not generally considered 'costs' * * *."); *Hutto* v. *Finney*, 437 U.S. 678, 693-697 (1978) (Congress may amend definition of costs to include attorneys' fees and have it apply to all litigants); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 772 (1980) (Burger, C.J., dissenting); cf. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) (Congress, not the courts, determines when and how attorneys' fees shall be awarded).[2] It follows that

---

[1] The Advisory Committee responsible for the original Federal Rules of Civil Procedure limited its entire explanation of Rule 68 to a citation to three state statutes, 2 Minn. Stat. § 9323 (Mason

---

1927); 4 Mont. Code Ann. § 9770 (1935); N.Y. C.P.A. § 177 (1937). Neither these statutes nor the practice under them aid in determining the meaning of "costs" in Rule 68. Cf., *e.g.*, *Watkins* v. *W.E. Neiler Co.*, 135 Minn. 343, 160 N.W. 864 (1917); *Morris-Turner Live Stock Co.* v. *Director Gen. of Railroads*, 266 F. 600 (D. Mont. 1920); *Margulis* v. *Solomon & Berck Co.*, 223 A.D. 634, 229 N.Y.S. 157 (1928). Rule 68 elicited virtually no discussion in the debates of the Advisory Committee. See ABA, *Rules of Civil Procedure for the District Courts of the United States* 337-338 (1938). The history of the 1946 and 1966 amendments to Rule 68 is similarly unenlightening. See Fed. R. Civ. P. 68 advisory committee note, 28 U.S.C. App. at 637.

[2] Notwithstanding the court of appeals' apparently contrary conclusion (see Pet. App. A11), this is all that *Roadway Express*, *supra*, actually held. In *Roadway Express*, the issue was whether the "costs" to be imposed on an attorney under 28 U.S.C. 1927 should include attorneys' fees because the action was brought under Title VII, the attorneys' fee provision of which defines fees "as part of the costs" (42 U.S.C. 2000e-5(k)). The Court ruled that "costs" in 28 U.S.C. 1927 should be read to track the definition of "costs" in 28 U.S.C. 1920 (which does not include attorneys' fees) because Congress enacted the two statutes together in 1853 as part of one, comprehensive legislative package. 447 U.S. at 757, 759-760. Rule 68, on the other hand, is not part of an integrated statute or rule provision that defines "costs." Instead, as Justice

when the action involves a statute that, like Section 1988, authorizes the award of attorneys' fees "as part of the costs," Rule 68 costs must include any attorneys' fees that might be awarded under the statute. Rule 68 thus requires that respondent bear that portion of his own attorneys' fees incurred after the making of petitioners' offer of judgment.[3]

Such a straightforward, "plain language" construction of the interplay between Rule 68 and attorneys' fee statutes has been widely accepted. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362-363 (1981) (Powell, J., concurring); *Fulps* v. *City of Springfield*, 715 F.2d 1088, 1091-1095 (6th Cir. 1983); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113-117 (N.D. Cal.

Powell has noted, "[i]n approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation. Cf. Fed. Rule Civ. Proc. 54(d)." *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 364 n.2 (1981) (Powell, J., concurring).

[3] Because Rule 68 is concerned only with liability for costs incurred after the making of the offer, respondent's entitlement to his pre-offer attorneys' fees of $32,000 is not at issue in this case. Moreover, the district court held (Pet. App. B10) that petitioners were not entitled to recover their post-offer costs, including attorneys' fees, from respondent, and petitioners have not challenged that ruling. Thus, this case does not present any issue concerning the circumstances in which a defendant might seek to collect his post-offer costs from the plaintiff.

In any event, reading "costs" in Rule 68 to include Section 1988 attorneys' fees does not have the result, suggested in Justice Rehnquist's dissenting opinion in *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 378 (1981), of requiring civil rights plaintiffs who reject Rule 68 offers also to absorb the *defendant's* attorneys' fees as costs. *Delta Air Lines* held that Rule 68 is entirely inapplicable when judgment is rendered in favor of the defendant. Thus, in any case to which Rule 68 applies, the defendant will by definition have lost the case. Section 1988, on the other hand, provides that fees may be awarded only to the prevailing party. Thus, the condition that entitles the defendant to be considered for the benefits of Rule 68 is the same condition that precludes him from taking advantage of Section 1988.

1979); *Scheriff* v. *Beck*, 452 F. Supp. 1254, 1259-1260 (D. Colo. 1978); cf. *Roadway Express*, 447 U.S. at 771-772 (Burger, C.J., dissenting) (same reasoning applied to "costs" in 28 U.S.C. 1927). Indeed, even the court below described this approach to the operation of Rule 68 as "logical" (Pet. App. A8), but it based its decision instead on its understanding of policy considerations extraneous to the statutory language. In so doing, the court ignored well-established principles of statutory construction, as well as logic, that support reading "costs" in Rule 68 to include attorneys' fees authorized by statutes defining those fees "as part of the costs."

Statutes should be construed so as to avoid making any word meaningless or superfluous. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Fulps*, 715 F.2d at 1093 & n.4 (citing cases). Moreover, statutory language is to be given its plain and ordinary meaning. *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975); *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968). The meaning of the phrase describing attorneys' fees "as part of the costs" is obvious. It means that attorneys' fees are to be treated like all other costs of litigation, to be granted if other costs are granted and to be denied if other costs are denied. Rule 68 denies costs incurred after the making of an offer more generous than the judgment finally obtained. The plain language of Section 1988 makes attorneys' fees a part of those costs.

When it drafted Section 1988, Congress, of course, simply could have authorized the recovery of attorneys' fees. But Congress chose to go further and characterize the fees as costs. In *Hutto* v. *Finney*, 437 U.S. at 693-697, this Court recognized that Congress's choice of language was deliberate.[4] While we do not contend that

---

[4] In *Hutto*, the Court held that Congress may redefine costs to include attorneys' fees without running afoul of the Eleventh Amendment. Congress surely knew that costs "have traditionally been awarded without regard for the States' Eleventh Amendment immunity" (437 U.S. at 695). Thus, by defining attorneys' fees

Congress chose this language specifically envisioning its effect in conjunction with Rule 68, we do contend, as this Court held in *Hutto*, that Congress's decision to "impose[] attorney's fees 'as part of the costs'" (*id.* at 695), was not simple inadvertence. That being the case, this Court should give the language of Section 1988 its ordinary meaning.

B. There is a still more compelling reason for this Court to read Section 1988's authorization for attorneys' fee awards "as part of the costs" to mean exactly that. Congress has enacted numerous statutes authorizing attorneys' fee awards for parties litigating certain claims in federal court. The vast majority of these statutes direct that such fees as are awarded should be assessed as costs. See Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 898-899. See also Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976: Source Book* 303-313 (Comm.

"as part of the costs," Congress was safeguarding its intent that states be held liable for attorneys' fees in civil rights litigation. See S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 & n.14 (1976). In upholding that intent, this Court held that "[j]ust as a federal court may treat a State like any other litigant when it assesses costs, *so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States*" (437 U.S. at 696 (emphasis added)). And, in concluding that "[t]here is ample precedent for Congress' decision to authorize an award of attorney's fees *as an item of costs*" (*id.* at 697 (emphasis added)), the Court emphasized the limited nature of its holding in a footnote: "Thus we do not suggest that our analysis would be the same *if Congress were to expand the concept of costs beyond the traditional category of litigation expenses*" (*id.* at 697 n.27 (emphasis added)). The Court thus explicitly recognized that Congress deliberately and intentionally categorized attorneys' fees under Section 1988 as an item of costs. See also *Roadway Express*, 447 U.S. at 772 (Burger, C.J., dissenting). The issue then becomes whether there is some compelling reason for the Court to ignore traditional canons of statutory construction so as *not* to give effect to this deliberate choice of language by Congress. We submit there is none.

Print 1976) (compiling 90 federal attorneys' fee statutes). In an appendix to this brief, we have listed the 141 federal attorneys' fee statutes that our research has uncovered. App., *infra*, 1a-9a. Of these, 91—including many of our most important legislative enactments[6]—describe attorneys' fees as part of the costs of litigation. With so many, and so many important, pieces of legislation involved, this Court should not ignore the effect of any of the statutory language and should adopt the "*specific and explicit provisions* for the allowance of attorneys' fees" made by Congress. *Alyeska*, 421 U.S. at 260 (emphasis added).

Indeed, the main point of this Court's decision in *Alyeska* was its recognition that Congress has *not* extended "any roving authority to the Judiciary to allow counsel fees *as costs or otherwise* whenever the courts might deem them warranted" (421 U.S. at 260 (emphasis added)). Rather, "the circumstances under which attorneys' fees are to be awarded *and the range of discretion of the courts in making those awards* are matters for Congress to determine" (*id.* at 262 (emphasis added)). The proper interpretation is one that relies on the language Congress has chosen (*id.* at 269):

> Since the approach taken by Congress to this issue has been to carve out specific exceptions * * * courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees * * * or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts'

---

[6] Among the statutes authorizing attorneys' fee awards as costs of litigation are Title VII, 42 U.S.C. 2000e-5(k); the Copyright Act, 17 U.S.C. 505; the Railway Labor Act, 45 U.S.C. 153; the Communications Act, 47 U.S.C. 206, 407; the Interstate Commerce Act, 49 U.S.C. 8, 16, 908; the Clayton (Anti-Trust) Act, 15 U.S.C. 15; the Securities Act of 1933, 15 U.S.C. 77k(e); the Trust Indenture Act of 1939, 15 U.S.C. 77ooo(e); and the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a).

> assessment of the importance of the public policies involved in particular cases.

Yet this is precisely what was done by the court below in refusing to give effect to the language of Section 1988 making attorneys' fees "part of the costs." [6]

C. Notwithstanding the clear interplay between the plain language of Rule 68 and the plain language of Section 1988, the court of appeals concluded that there is no reason to suppose that "costs" in Rule 68 was meant to include attorneys' fees. Pet. App. A4-A5, A9-A11. The court of appeals assumed that awards of attorneys' fees were "uncommon" in 1938, when Rule 68 was promulgated. Pet. App. A4. This assumption is similar to the approach taken by the dissent in *Delta Air Lines*, 450 U.S. at 377 (Rehnquist, J., dissenting), which stressed the importance of looking to the "contemporaneous understanding" of the term "costs" at the time of Rule 68's promulgation. The dissent assumed that "the 'contemporaneous understanding' of 'costs' when the Federal Rules of Civil Procedure were promulgated in 1938 did not include attorneys' fees any more than it did in 1813 when the predecessor to § 1927 was enacted." *Delta Air Lines*, 450 U.S. at 377 (Rehnquist, J., dissenting).

Additional research reveals, however, that this assumption is probably incorrect. Between 1813 and 1938, Congress itself began the practice of awarding attorneys' fees as part of the costs. By the time Rule 68 was promulgated in 1938, Congress had on numerous occasions defined the term "costs" to include attorneys' fees. See App., *infra*, 1a-3a, 6a. Moreover, it appears that the great majority of statutes enacted prior to 1938 that authorized attorneys' fee awards did so as part of the costs.[7] Furthermore, these statutes constituted much of the major legislation of the period: the Clayton (Anti-Trust) Act, 15 U.S.C. 15; the Securities Act of 1933, 15 U.S.C. 77k(e); the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a); the Interstate Commerce Act, 49 U.S.C. 8, 16, 908; the Railway Labor Act, 45 U.S.C. 153; and the Copyright Act of 1909, 17 U.S.C. 505 (formerly codified at 17 U.S.C. 40).[8]

---

[6] The rule established in *Alyeska* also is sufficient answer to the objection that our interpretation of Rule 68 and Section 1988 would create a two-tiered system of cost-shifting under Rule 68 depending upon the language of the statute authorizing attorneys' fees. See *Delta Air Lines*, 450 U.S. at 378 (Rehnquist, J., dissenting); *Roadway Express*, 447 U.S. at 762-763. If this is the result, it is a result compelled by Congress's choice of language and a matter for Congress to correct if it chooses. Indeed, Section 1988 itself is Congress's response to the two-tiered system for awarding attorneys' fees created by this Court's *Alyeska* decision. See S. Rep. 94-1011, 94th Cong., 2d Sess. 1-2 (1976); page 15, *infra*.

Congress must be presumed to have had knowledge of these provisions when Rule 68 was promulgated in 1938. Indeed, given the number and prominence of the relevant statutes, this presumption is not merely a legal fiction; it is difficult to believe that Congress was unaware of the terms of so many enactments. Thus, by 1938, the contemporaneous understanding of costs was clearly quite different than it had been in 1813,[9] and there is no basis for concluding that Congress had in mind a fixed definition of costs that excluded attorneys' fees. This history, in conjunction with the mandate of *Alyeska,* the great number of statutes affected, and the policy considerations discussed below, all counsel the Court to read both Rule 68 and Section 1988 according to their plain meaning.

---

[7] The appendix shows that of the 25 statutes currently in force that authorize attorneys' fee awards and that were in force at the time Rule 68 was promulgated, 19 describe attorneys' fees as part of the costs. App., *infra*, 1a-3a, 6a-8a. The numbers may well have been larger in the past, for the appendix does not include statutes that were enacted and in force around 1938 but subsequently have been repealed.

[8] The legislative alterations in the traditional definition of "costs" to include attorneys' fees did not go unnoticed in the literature either. See, *e.g.*, Goodhart, *Costs*, 38 Yale L.J. 849, 878 (1929) (footnotes omitted) ("[A] number of recent federal and state statutes include provisions giving substantial costs to the successful party. Thus the Clayton Act allows * * * reasonable attorney's fees * * *.").

[9] The Court itself has acknowledged the effect of these statutes on the traditional understanding of "costs." In *Hutto*, 437 U.S. at 697 n.27 (emphasis added), the Court recognized that including

II. The Court Of Appeals Erred In Rejecting The "Logical" Approach To Harmonizing Rule 68 And Section 1988

The court of appeals acknowledged that the construction of Rule 68 for which we have argued above is "logical" (Pet. App. A8), but it then proceeded to discard logic in favor of a misguided policy analysis and an obsolete and inappropriate approach to the Rules Enabling Act, 28 U.S.C. 2072. As we demonstrate below, the court erred in both respects.

A. The Policies Underlying Both Section 1988 And Rule 68 Require Limiting A Plaintiff's Attorneys' Fee Award To Fees Incurred Before The Making Of The Defendant's Offer Of Judgment

1. Contrary to the court of appeals' conclusion, holding a plaintiff responsible for his own post-offer attorneys' fees does not "cut[] against the grain of section 1988" (Pet. App. A8). Rather, construing "costs" under Rule 68 as encompassing attorneys' fees under Section 1988 is fully consistent with congressional intent in enacting Section 1988 and, indeed, is the only result that harmonizes that intent with the clear and important purposes underlying the promulgation and congressional consideration of Rule 68. See *Delta Air Lines,* 450 U.S. at 364 (Powell, J., concurring). There is no support for concluding, as did the court of appeals, that in enacting Section 1988 Congress impliedly intended to curtail the ordinary application of Rule 68. In operation, the two

---

attorneys' fees in costs did not "expand the concept of costs beyond the *traditional category of litigation expenses.*"

provisions need not come into conflict. It is possible to award attorneys' fees within the terms of Section 1988 while limiting such fees, as is required by Rule 68, to those incurred before an offer of judgment. And while the legislative history of Section 1988 is silent with respect to Rule 68 specifically, it is quite clear that Congress did not think it was establishing an unqualified right to attorneys' fees when it enacted Section 1988.[10]

Congress provided for an award of "a reasonable attorney's fee as part of the costs" in Section 1988 in response to this Court's rejection in *Alyeska* of the "private attorney general" rationale that had been employed by some lower courts as a basis for attorneys' fee awards in litigation deemed to further the public interest. S. Rep. 94-1011, 94th Cong., 2d Sess. 1-2 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 1-3 (1976). Undoubtedly, as the court below noted, the primary purpose of Section 1988 is to encourage the bringing of meritorious civil rights actions in order to utilize fully "private attorneys general" in securing compliance with civil rights laws. See Pet. App. A8. But Section 1988 is not an unqualified, single-minded provision intended to override any contrary policies that stand in its way.[11]

---

[10] This silence concerning Rule 68 in the legislative history of Section 1988 takes on some significance when one remembers that Rule 68 has been part of the Federal Rules of Civil Procedure since 1938 and that statutes taxing attorneys' fees "as part of the costs" have been in existence even longer. See pages 12-13 & note 7, *supra*.

[11] On several recent occasions, this Court has rejected similar arguments for subordinating other rules of law to the goal of enforcing the civil rights laws. For example, in *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 156-159 (1982), the Court held that a private Title VII plaintiff seeking to maintain a class action must comply with the requirements of Fed. R. Civ. P. 23. Similarly, the Court refused to find that Congress implicitly intended to exempt civil rights cases from the ordinary operation, under 28 U.S.C. 1738, of res judicata, *Migra* v. *Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984), slip op. 4-9; *Kremer* v. *Chemical*

Rather, fee awards under Section 1988 must be "reasonable." [12] The debates over passage of Section 1988 reflect Congress's concern that the bill could induce plaintiffs and plaintiffs' attorneys to pursue marginal or frivolous litigation. During the House hearings on the bill that was ultimately enacted as Section 1988, Representative Seiberling noted that the bill "certainly [was] not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit * * *." *Awarding of Attorneys' Fees: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 8 (1975). See also, *e.g.*, 122 Cong. Rec. 31473, 31474, 31830 (1976) (statements of Sen. Allen); 122 Cong. Rec. 31832 (1976) (remarks

---

Constr. Corp., 456 U.S. 461 (1982), and of collateral estoppel, *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980). In these cases, the Court held that plaintiffs seeking to vindicate the public policy of civil rights enforcement must suffer the same consequences as any other plaintiff when their own conduct in a lawsuit is such as to invoke well-established rules reflecting concerns of judicial economy and fairness to defendants. It is difficult to see why the result should be any different with respect to Rule 68's policy of encouraging settlement of marginal lawsuits. See *Delta Air Lines*, 450 U.S. at 352, 356, 359 n.24; *id.* at 363 (Powell, J., concurring); *id.* at 380 (Rehnquist, J., dissenting).

[12] The court of appeals avoided the limitations established in the statute and the legislative history by relying on a passage from the Senate Report stating that private attorneys general " 'should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose" (Pet. App. A8 (quoting S. Rep. 94-1011, *supra*, at 5)). This language, however, is irrelevant to the issue before the Court. There is no question here of respondent's having to pay petitioners' counsel fees; the only question is whether respondent's post-offer fees should be borne by petitioners. See page 8 note 3, *supra*.

of Sen. Abourezk); 122 Cong. Rec. 31834 (1976) (remarks of Sen. Helms).[13]

This legislative history should be considered not in the abstract, but against the factual background of this case, in which respondent seeks to charge petitioners $171,000 in post-offer attorneys' fees for work that did not produce any additional benefits; instead, the post-offer fees were incurred to produce a jury verdict that was $8,000 less than petitioners' offer.[14] Given these results, it is "unreasonable," and thus contrary to Section 1988, to reward respondent's attorneys with $171,000 in post-offer fees. As the court stated in *Waters* v. *Heublein, Inc.*, 485 F. Supp. at 114, there is "little reason to reward

---

[13] Cf. Note, Delta Air Lines, Inc. v. August: *The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 631 (1982). In fact, even in cases in which there is no clear rule governing the allocation of costs, no fee award is appropriate when "special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See also S. Rep. 94-1011, *supra*, at 4 (adopting *Piggie Park* standard); H.R. Rep. 94-1558, *supra*, at 6 (same). Among the special circumstances for denying attorneys' fees is the maintenance of suit "vexatiously." *Piggie Park*, 390 U.S. at 402 n.4. As this Court has recognized, "Rule 68 is an outgrowth of the equitable practice of denying costs to a plaintiff 'when he sues vexatiously after refusing an offer of settlement.'" *Delta Air Lines*, 450 U.S. at 356 (footnote omitted). Congress's intentions with respect to Section 1988 and Rule 68 thus mesh quite neatly. See pages 18-21, *infra*.

[14] Although the offer of judgment in this case was for "a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS" (J.A. 17), the courts below never suggested that the form of the offer was invalid by virtue of setting a ceiling on attorneys' fees. Cf. *Delta Air Lines*, 450 U.S. at 365-366 (Powell, J., concurring). Since Rule 68 certainly was not intended to preclude parties from agreeing on the amount of attorneys' fees (*id.* at 365 n.4)—and probably would be unworkable for defendants if so construed (see Pet. App. A3-A4)—we do not think it is of any consequence that the parties in this case stipulated to the amount of respondent's pre-offer fees after trial rather than at the time the offer was made.

[an] attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits."

As the legislative history discussed above makes clear, no such unreasonable result is required to effectuate the policies of Section 1988. Rather, Congress left ample room for Section 1988 to be intermeshed with other provisions of law reflecting equally important policies involved in the judicial enforcement of rights.[15] Fed. R. Civ. P. 1 provides that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every [civil] action." Rule 68, whose purpose was ignored by the court below, encourages settlements and thereby avoids unnecessarily protracted litigation by providing a realistic deterrent that compels offerees to consider seriously good faith offers of judgment. *Delta Air Lines*, 450 U.S. at 352 & n.8, 363 (Powell, J., concurring); *id.* at 379-380 (Rehnquist, J., dissenting); Fed. R. Civ. P. 68 advisory committee note, 28 U.S.C. App. at 637; 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3001, at 56 (1973). There can be no dispute over the importance and desirability of this goal. As Justice Powell explained in a similar context in his concurring opinion in *Delta Air Lines*, 450 U.S. at 363-364 (footnote and citation omitted):

> Title VII's fee provision [identical to Section 1988] was designed to enable plaintiffs to vindicate their rights through litigation. * * * On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement

---

[15] The House Report explains that Congress rejected the option of making awards of attorneys' fees mandatory for any prevailing party and instead deliberately chose "the more moderate approach" of leaving awards to the discretion of the courts in order to prevent abuses by plaintiffs and their lawyers. H.R. Rep. 94-1558, *supra*, at 5-6, 8; see also 122 Cong. Rec. 31832 (1976) (remarks of Sen. Abourezk). Rule 68 is simply another measure that aims to achieve precisely this same goal.

> rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.
>
> * * * It therefore seems clear that the relevant interests—of both parties and the public—will be served by construing Title VII and Rule 68 in accordance with their plain language.

This is no less true with respect to Section 1988. The purpose of Rule 68 dictates a construction that will operate, to the greatest extent possible, to provide a realistic deterrent to continued litigation so that offerees will seriously consider good faith offers of judgment.[16] This is especially true in actions such as this one, in which respondent persisted in pressing a claim for $3,500,000 in damages—a claim that bore no relationship to a realistic evaluation of the value of the case, ultimately determined by a jury to be $60,000. Congress's intent to facilitate the bringing of meritorious civil rights cases, manifested in the enactment of Section 1988, certainly does not mean that Congress also intended to promote full-blown litigation of every such claim even in the face of reasonable settlement offers. See S. Rep. 94-1011, *supra,* at 5 ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."). This Court likewise has recognized the desirability of settling civil rights claims. See *Maher* v. *Gagne,* 448 U.S. 122, 129 (1980); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance [are] * * * the preferred means" for achieving compliance with Title VII).

---

[16] As a reason for refusing to apply Rule 68 to this case, the court of appeals observed that lawyers would "have to think very hard" before rejecting an offer, even if they initially considered it inadequate, because they would know that a mistake could cost them a lot of money (Pet. App. A8). Such increased consideration is the precise purpose of Rule 68, and serious thought about a serious offer should not be rejected as harmful.

The court also expressed concern that a Rule 68 offer of judgment made immediately after the filing of the complaint might deter a plaintiff's lawyers from conducting any discovery (Pet. App. A8-A9). The court's fears seem exaggerated. Before filing suit, a plaintiff's lawyers should have sufficient information to permit evaluation of an early offer of judgment.

In any event, the fact that an offer may be made before discovery is not all that significant. True, discovery may reveal information that strengthens a plaintiff's case, but it may also destroy it. There is no particular reason to think that discovery is of more benefit to one side than to the other.

In addition to ignoring Rule 68's goal of promoting settlements, the court of appeals failed to consider the equities from a defendant's perspective. As this Court has recognized, Rule 68 incorporates elementary principles of fairness (*Delta Air Lines,* 450 U.S. at 356):

> If a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered.

Although the Court in *Delta Air Lines* did not address itself to attorneys' fees, the equitable considerations are at least as strong in the case of fees as in the case of more traditional "costs." That is particularly the case here, where respondent's rejection of petitioners' reasonable offer of judgment led to the expenditure of an additional $171,000. Respondent was of course free to gamble that he would do better before a jury than by accepting petitioners' offer, but it is hardly fair to expect petitioners to bankroll the exercise of respondent's mistaken judgment.

In sum, the court of appeals went astray in its analysis of the relevant policy considerations. As Justice Powell observed in his concurring opinion in *Delta Air Lines*, 450 U.S. at 363-364, the goals of Rule 68 and civil rights fee-shifting statutes can be easily harmonized. Indeed, those goals are virtually identical: to create an incentive structure that will lead to the optimal level of litigation, encouraging meritorious and discouraging pointless litigation. It is thoroughly appropriate, therefore, to read Rule 68 and Section 1988 together.

2. The court of appeals' policy analysis also is inconsistent with this Court's approach to Section 1988 as set forth in *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983). In examining the reasonableness of attorneys' fees awarded under Section 1988, the Court in *Hensley* held that the amount of fees recoverable is dependent, to a very large extent, on the degree of success obtained. Slip op. 9-12. "[E]xcellent results" ordinarily should result in the award of a fully compensatory fee, but "partial or limited success" may well mandate a reduction in the fee award. Slip op. 11.

Generally, as the Court recognized, "[t]here is no precise rule or formula" for determining reasonable attoneys' fees under Section 1988. *Hensley*, slip op. 12. In the instant case, however, a well-established rule having the force of a statute (see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 13 (1941)) prescribes precisely, by a procedure equitable to the parties and beneficial to the judicial system, the equation for ensuring that the amount of fees awarded to a prevailing plaintiff bears a reasonable relationship to the degree of success achieved. Under Rule 68, a party who prevails but obtains a final judgment less favorable than a previous offer of judgment receives an award of attorneys' fees for his counsel's pre-offer work; this ensures compensation for all work that produced the offer. Work done after rejection of the offer, on the other hand, produced no additional benefits, and the offeree should not be permitted to recover his fees from the offeror who has made a reasonable effort to end the litigation before additional costs are incurred. This result is fully consistent with *Hensley*, which clearly establishes that Section 1988 does not authorize fee awards for unproductive work. Slip op. 9. See also *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), slip op. 13 ("Due regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on which effort was expended and the ultimate relief obtained."); *Vocca* v. *Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 607-608 (7th Cir. 1982) (no fees awarded because plaintiff refused to accept reasonable settlement); *Copeland* v. *Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (no fee award for nonproductive time).

B. Construing "Costs" Under Rule 68 As Encompassing Attorneys' Fees Under Section 1988 Does Not Render Rule 68 Invalid Under The Rules Enabling Act

The court of appeals also held that its interpretation of Rule 68 was required by the Rules Enabling Act, 28 U.S.C. 2072. That Act, which delegates authority to this Court to make rules governing the "practice and procedure" of the federal courts, provides, in pertinent part, that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." In a short, enigmatic discussion, the court of appeals reasoned that the right to attorneys' fees created by Section 1988 is more "procedural" then "substantive" in some senses, more "substantive" than "procedural" in other senses, and both "substantive" and "procedural" in reality before finally concluding that "[f]or present purposes it is substantive." Pet. App. A9. The right established in Section 1988 is a "substantive" one, according to the court of appeals, because rather than "mak[ing] the litigation process more accurate and efficient for both parties * * * it is designed instead to achieve a substantive objective—compliance with the civil rights laws." Pet. App. A9. Thus, the court concluded that the Rules Enabling Act requires the imposition of a limitation on the ordinary operation of Rule 68 in order to avoid interference with the "substantive right" to attorneys' fees. The court's analysis misconstrues the meaning of the Rules Enabling Act, the status of the rules promulgated pursuant thereto, and the proper construction of the rules in the light of other federal statutes.

The validity of any particular application of a federal rule turns on a proper understanding of the meaning of the phrase "substantive right" as employed in the Rules Enabling Act. The lower court interpreted "substantive" in Section 2072 in contradistinction to "procedural." This is the result of that court's misinterpretation of a series of decisions in which this Court relied on the substance/procedure dichotomy. See, *e.g.*, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438 (1946); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). See generally, Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718-738 (1974). All of these cases were diversity suits in which the issue was whether the federal rule altered a state law. The Court's concern with protecting state substantive law from encroachment by the federal judiciary—whether in the guise of judicially created federal common-law or judicial exercises of delegated authority from Congress—was apparent.[17] In *Sibbach*, for example, the Court concluded that Section 2072 was to be interpreted under *Erie's* substance/procedure rubric because Congress "has never essayed to declare the substantive *state* law, or to abolish or nullify a right recognized by the substantive law of the *state* * * * .

---

[17] The Rules Enabling Act was passed in 1934, but the first rules were not promulgated until 1938, the same year that the Court decided *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). The first case in which the Court was called upon to interpret Section 2072—*Sibbach*—arose a scant three years later.

On the contrary it has enacted that the state law shall be the rule of decision in the federal courts" (312 U.S. at 10 (emphasis added; footnote omitted)). See also *Ragan*, 337 U.S. at 533-534 (Fed. R. Civ. P. 3, which tolls statutes of limitations upon the filing of the complaint in nondiversity suits, cannot be so applied in diversity suits because "the principle of *Erie R. Co.* v. *Tompkins*" demands that state law be applied).

Whether or not it is appropriate in diversity cases to construe Section 2072 in light of the substance/procedure dichotomy deriving from *Erie*,[18] it is manifestly clear that this approach is inapplicable when, as in the instant case, suit is brought under federal law. The federalism concerns that animated the diversity cases and gave rise to the elusive substance/procedure dichotomy no longer exist when a federal rule is challenged because it "abridge[s], enlarge[s] or modif[ies]" a *federally* created "substantive right." Instead, in the federal question context, the phrase "substantive right" in Section 2072 refers to the allocation of authority between Congress and the Court.[19]

---

[18] The Court has subsequently repudiated the use of *Erie's* substance/procedure dichotomy even in the diversity context as the test for determining the validity of federal rules under the Rules Enabling Act. See *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 747-753 (1980); *Hanna* v. *Plumer*, 380 U.S. 460, 469-474 (1965); Ely, *supra*, 87 Harv. L. Rev. at 718-738. In its place, the Court has held that where there is a "direct collision" between a federal rule and state law, the test is "whether the Rule [is] within the scope of the Rules Enabling Act * * *, and if so, within a constitutional grant of power." *Walker*, 446 U.S. at 748; *Hanna*, 380 U.S. at 470-472. As the Court explained in *Sibbach*, 312 U.S. at 14, whether a rule is within the scope of the Rules Enabling Act depends upon:

> whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

So long as a federal rule *does* regulate procedure, it is valid, whether or not it affects substantive rights. See *Hanna*, 380 U.S. at 464-474; *Murphree*, 326 U.S. at 445-446; *Sibbach*, 312 U.S. at 14. Thus, analysis premised upon the distinction between substance and procedure has been abandoned for a test that focuses on procedure alone. That test does not even remotely resemble the test under *Erie* or *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945) (outcome-determinativeness test for substance/procedure) (cited by the court below at Pet. App. A9). So long as a rule governs "practice and procedure" (28 U.S.C. 2072), it is valid. See also *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) (labeling the new approach the "arguably procedural" test).

This test results from the interaction between the constitutional policies of federal supremacy and federalism. In *Hanna*, 380 U.S. at 471-472 (footnote omitted), the Court explained:

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in * * * the Constitution; in such areas state law must govern because there can be no other law. But the opinion in *Erie* * * * involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense * * *. [T]he constitutional provision for a federal court system * * * carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

The foregoing analysis has no logical applicability when the conflict is not between state law and a federal rule, but between *federal* law and a federal rule. Such conflicts raise questions of congressional delegation and statutory construction. Thus, the United States does not ask this Court to uphold the application of Rule 68 in this case under the test of *Hanna* and *Walker*. We note, however, that under that test, it is obvious that the court of appeals erred in not applying Rule 68 to bar recovery of respondent's post-offer attorneys' fees. Clearly, Rule 68 "really regulates procedure" within the meaning of Section 2072. See page 27 note 21, *infra*. Under the diversity cases discussed above, the reference to "substantive right[s]" in Section 2072 is inapplicable where this is the case. See *Hanna*, 380 U.S. at 472; *Sibbach*, 312 U.S. at 14; Ely, *supra*, 87 Harv. L. Rev. at 718-720.

[19] The legislative history of the Rules Enabling Act supports this construction of Section 2072. Although the debates and legislative reports pertaining to the statute as finally enacted are sparse and

Because, when it promulgates rules pursuant to Section 2072, the Court exercises power delegated to it by Congress, a two-step inquiry is called for in judging a rule's validity. First, does the Constitution permit Congress to delegate to the Court authority to enact the particular rule? Second, if the answer is affirmative, has Congress in fact delegated the necessary authority? The second step is one of statutory construction[20] and

---

uninformative, see Burbank, *The Rules Enabling Act,* 130 U. Pa. L. Rev. 1015, 1096-1097 (1982); see also S. Rep. 1049, 73d Cong., 2d Sess. (1934); H.R. Rep. 1829. 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9363, 10866 (1934), the Rules Enabling Act was originally proposed, in virtually identical form, in 1926, and again in 1928. See S. 477, 69th Cong., 1st Sess. (1926); S. 759, 70th Cong., 1st Sess. (1928). The legislative materials from these earlier attempts clearly reveal that Congress, in referring to "substantive right[s]," sought only to make clear its intention in the delegation to the Court contained in the Act's first sentence: that the Rules Enabling Act vested in the Court as much authority to make rules as the Constitution permits, but no more. See S. Rep. 1174, 69th Cong., 1st Sess. 9-16 (1926) (report accompanying S. 477); S. Rep. 440 (Pt. 2), 70th Cong., 1st Sess. 16-17 (1928) (report accompanying S. 759). For an exhaustive consideration of this generally ignored, pre-1934 legislative history, see Burbank, *supra,* 130 U. Pa. L. Rev. at 1035-1113.

That Congress was concerned with the limits of its power to delegate authority rather than with protecting state law from federal encroachment is not surprising. In 1934, *Erie* was four years away, and in the 1920's, when most of the Rules Enabling Act debate took place, *Swift* v. *Tyson,* 41 U.S. (16 Pet.) 1 (1842), was in full bloom. The question of congressional authority to delegate responsibility to other branches of government, on the other hand, was extremely controversial. See, *e.g.,* R. Jackson, *The Struggle for Judicial Supremacy* (1941).

[20] This Court has never decided a case concerning the meaning of the Rules Enabling Act in a nondiversity context. Lower courts that have construed Section 2072 in federal question cases, however, have uniformly treated the issue as one of statutory construction. See *Brennan* v. *Silvergate District Lodge No. 50,* 503 F.2d 800, 804-805 (9th Cir. 1974); *United States* v. *Gustin-Bacon Division,* 426 F.2d 539, 542-543 (10th Cir.), cert. denied, 400 U.S. 832 (1970); 7 (Pt. 2) J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 86.04[4] (2d ed. 1984).

requires both that the rule be within the terms of the Rules Enabling Act and that Congress not have exercised its unquestioned authority, see *Sibbach,* 312 U.S. at 14-15; *Wayman* v. *Southard,* 23 U.S. (10 Wheat.) 1, 42-43 (1825); *United States* v. *Gustin-Bacon Division,* 426 F.2d 539, 542 (10th Cir.), cert. denied, 400 U.S. 832 (1970), to overrule the Court.

Neither the parties to this lawsuit nor the court below have questioned the constitutionality of Rule 68 as an exercise of delegated authority pursuant to Section 2072, even when attorneys' fees are placed within the larger set of "costs."[21] Moreover, as we have argued above, Rule 68 was approved by Congress with the understanding that it would incorporate the definition of costs contained in the statute underlying the motion for attorneys' fees. See pages 9-10 & note 4, *supra.* The only remaining question, therefore, is whether, in enacting Section 1988, Congress intended an implied, partial repeal of Rule 68 in civil rights cases.

The Federal Rules of Civil Procedure have the force of statutes. *Sibbach,* 312 U.S. at 13; 7 (Pt. 2) J. Moore,

---

[21] There is no question that Rule 68 is, in fact, constitutional. Congress may delegate to the Court authority "to regulate the practice of the court and to facilitate the transaction of its business." *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 635 (1924). This is so even though the delegation is of powers "which the legislature may rightfully exercise itself." *Wayman,* 23 U.S. (10 Wheat.) at 19. The allocation of costs and attorneys' fees is a tool that affects the judicial process, not the underlying sources of substantive rights upon which the parties base their claims. *White* v. *New Hampshire Dep't of Employment Security,* 455 U.S. at 451-452 (attorneys' fee awards are "not compensation for the injury giving rise to an action" and are "uniquely separable from the cause of action to be proved at trial"); see also *New York Gaslight Club, Inc.* v. *Carey,* 447 U.S. 54, 66 (1980); *Hutto* v. *Finney,* 437 U.S. at 691, 695 n.24; *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 170 (1939). Consequently, cost and fee-shifting rules govern the practice and procedure of courts and are within the power of Congress under the Constitution to delegate to the Court. See also *Alyeska,* 421 U.S. at 262 (Congress may authorize fee-shifting at discretion of courts).

J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 69.04 (2d ed. 1984). A strong presumption exists in favor of the Rules' validity. *Hanna*, 380 U.S. at 471, 473; *H.F.G. Co.* v. *Pioneer Pub. Co.*, 162 F.2d 536, 539 (7th Cir. 1947); *Helms* v. *Richmond Petersburg Turnpike Auth.*, 52 F.R.D. 530, 531 (E.D. Va. 1971); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4508, at 133 (1982). Repugnancy of a later-enacted statute to a federal rule is not to be lightly inferred. *Weiss* v. *Temporary Investment Fund, Inc.*, 692 F.2d 928, 936 (3d Cir. 1982); see also *Gustin-Bacon Division*, 426 F.2d at 542; 7 (Pt. 2) *Moore's Federal Practice*, *supra*, ¶ 86.04[4] ("[A] subsequently enacted statute should be so construed as to harmonize with the Federal Rules if that is at all feasible."). Rather, absent "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure," *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979), a federal statute is assumed not to alter the operation of the Federal Rules of Civil Procedure. See also *Weiss*, 692 F.2d at 936 ("abrogation" of a rule is "inappropriate" absent a "clear expression of congressional intent"); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1134-1135 n.50 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1980) ("Congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal."); *Brennan*, 503 F.2d at 804-805; *Gustin-Bacon Division*, 426 F.2d at 542.

The court of appeals did not find any "clear expression of congressional intent" to exempt fee applications filed under Section 1988 from the normal operation of Rule 68. The lower court merely *inferred* such an intention from the policy behind Section 1988 "to encourage the bringing of meritorious civil rights actions" and to further "compliance with the civil rights laws" (Pet. App. A8, A9). Implied repeals are strongly disfavored, however, and are found only when two acts are in irreconcilable conflict or when a later act covers the whole subject of an earlier one and is clearly intended as a substitute; and, even then, " 'the intention of the legislature to repeal must be clear and manifest . . . .' " *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976)); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 787-788 (1981) (citing cases). This policy against implied repeals applies *a fortiori* in considering the effect of Section 1988 on Rule 68 in light of the strong presumption in favor of the validity of the Federal Rules. The court of appeals thus clearly erred in holding that the Rules Enabling Act presents any obstacle to the normal operation of Rule 68 in the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN B. KUHL
Deputy Assistant Attorney General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ROBERT S. GREENSPAN
BARBARA S. WOODALL
Attorneys

JULY 1984

APPENDIX

This appendix lists all the federal attorneys' fee statutes currently in force that our research has disclosed. The statutes are broken down into two large groups: those that award attorneys' fees as costs and those that do not. Within each of these two groups, the statutes are broken down further according to the verbal formulation used by Congress. Within each of these groups, the statutes are broken down yet again by year of enactment: those enacted contemporaneously or prior to the promulgation of Fed. R. Civ. P. 68 are set apart from more recent enactments. Statutes are listed by popular name and by location in the United States Code.

The appendix reveals that Congress favors awarding attorneys' fees as costs. Ninety-one of the 141 statutes we have found award fees as part of the costs of litigation. Of the statutes currently in force that were enacted prior to 1938, 19 of 25 award fees as costs. It should be noted that these figures do not include statutes that have been repealed and are no longer found in the United States Code.

I. STATUTES AWARDING ATTORNEYS' FEES AS PART OF THE COSTS

Statutory formula—
"Attorney's fees as part of the costs"

Enacted prior to 1938

Copyright Act of 1909, 17 U.S.C. 40 (now codified at 17 U.S.C. 505)

Enacted subsequent to 1938

Agricultural Fair Practices Act of 1967, 7 U.S.C. 2305(a) and (c)

Education Amendments of 1972, 20 U.S.C. (1976 ed.) 1617

Jury System Improvements Act of 1978, 28 U.S.C. 1875(d)(2)

Rehabilitation Act of 1973, 29 U.S.C. 794a(b)

Voting Rights Act of 1965, 42 U.S.C. 1973*l*(e) (as amended in 1975)

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. (Supp. V) 1988

Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997c(d)

Civil Rights Act of 1964, Tit. II, 42 U.S.C. 2000a-3(b)

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-5(k)

Statutory formula—
"Attorneys' fees to be taxed and collected as part of the costs"

Enacted prior to 1938

Packers and Stockyards Act of 1921, 7 U.S.C. 210(f)

Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499g(b) (as amended in 1937)

Railway Labor Act of 1926, 45 U.S.C. 153

Shipping Act of 1916, 46 U.S.C. 829

Communications Act of 1934, 47 U.S.C. 206

Communications Act of 1934, 47 U.S.C. 407

Interstate Commerce Act, 1887, 49 U.S.C. 8

Interstate Commerce Act, 1887, 49 U.S.C. 16

Interstate Commerce Act, 1887, 49 U.S.C. 908(b) and (e)

Enacted subsequent to 1938

Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11705(d)(3)

Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11710(b)

Statutory formula—
"Costs(including attorneys' fees)"

Enacted Prior to 1938

Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499f(e)
Clayton Antitrust Act, 15 U.S.C. 15
Unfair Competition Act, 1916, 15 U.S.C. 72
Securities Act of 1933, 15 U.S.C. 77k(e)
Securities Exchange Act of 1934, 15 U.S.C. 78i(e)
Securities Exchange Act of 1934, 15 U.S.C. 78r(a)
Indian General Allotment Act, 1887, 25 U.S.C. 331
Merchant Marine Act of 1936, 46 U.S.C. 1227

Enacted subsequent to 1938

Ethics in Government Act of 1978, 2 U.S.C. 288i(d)
Commodity Exchange Act, 7 U.S.C. 18(c), (d) and (e) (added in 1983)
Home Owners' Loan Act of 1933, 12 U.S.C. 1464(q)(3) (added in 1982)
Bank Holding Company Act Amendments of 1970, 12 U.S.C. 1975
Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a)(2)
Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 26
Trust Indenture Act, 1939, 15 U.S.C. 77ooo(e)
Trust Indenture Act, 1939, 15 U.S.C. 77www(a)
Act of July 31, 1970, 15 U.S.C. 298(b), (c) and (d)
Consumer Product Safety Act, 15 U.S.C. 2060(c)
Consumer Product Safety Act, 15 U.S.C. 2072(a) and (b)
Consumer Product Safety Act, 15 U.S.C. 2073
Hobby Protection Act, 15 U.S.C. 2102
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2310(d)

Toxic Substances Control Act, 15 U.S.C. 2622(b)(2)(B)

Export Trading Company Act of 1982, 15 U.S.C. 4016(b)

Endangered Species Act of 1973, 16 U.S.C. 1540(g)(4)

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c)

Act of Oct. 1, 1965, 25 U.S.C. 565c

Act of Oct. 1, 1965, 25 U.S.C. 565d

Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(e)

Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1427(c)

Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3)

Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(b)

Federal Mine Safety and Health Act of 1977, 30 U.S.C. 938(c)

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(d)

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275(c)

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1293(c)

Federal Water Pollution Control Act, 33 U.S.C. 1367(c)

Federal Water Pollution Control Act, 33 U.S.C. 1365(d)

Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(4)

Act to Prevent Pollution from Ships, 33 U.S.C. 1910(d)

Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(2)(B)(ii)

Safe Drinking Water Act, 42 U.S.C. 300j-8(d)

Civil Rights Act of 1964, Tit. III, 42 U.S.C. 2000b-1
Noise Control Act of 1972, 42 U.S.C. 4911(d)
Act of Nov. 6, 1978, 42 U.S.C. (Supp. V) 5851(e)(2)
Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. (Supp. V) 6104(e)(1)
Energy Policy and Conservation Act, 42 U.S.C. 6305(d)
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6971(c)
Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. V) 6972(e)
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7413(b)
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7604(d)
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7622(b)(2)(B)
Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. V) 8435(d)
Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9610(c)
Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. V) 1349(a)(5)
Rail Transportation Improvement Act, 45 U.S.C. 854(g)
Act of Sept. 14, 1973, 47 U.S.C. (Supp. V 1975) 331(b) (repealed in 1975)
Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. (Supp. V) 2014(e)

Statutory formula—
"Attorneys' fees and other litigation costs"

Enacted prior to 1938

None

Enacted Subsequent to 1938

Freedom of Information Act, 5 U.S.C. 552(a)(4)(E) and (F)

Privacy Act of 1974, 5 U.S.C. 552a(g)(2)(B), (3)(B)

Government in the Sunshine Act, 5 U.S.C. 552b(i)

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 57a(h)(1)

Toxic Substances Control Act, 15 U.S.C. 2605(c)(4)(A)

National Historic Preservation Act Amendments of 1980, 16 U.S.C. 470w-4

Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 825q-1(b)(2)

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2520

Act of Sept. 21, 1968, 25 U.S.C. 788f

Privacy Protection Act of 1980, 42 U.S.C. (Supp. V) 2000aa-6(f)

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1810(c)

Statutory formula—
"Costs other than attorneys' fees"

Enacted Prior to 1938

Act of May 18, 1928, 25 U.S.C. 655

Enacted Subsequent to 1938

None

II. STATUTES AWARDING ATTORNEYS' FEES AND COSTS AS SEPARATE ITEMS

Statutory formula—
"Costs and a reasonable attorney's fee" **or**
"costs together with a reasonable attorney's fee"

Enacted prior to 1938

Norris-La Guardia Act, 29 U.S.C. 107
Fair Labor Standards Act of 1938, 29 U.S.C. 216
Interstate Commerce Act, 49 U.S.C. 322(b)
Interstate Commerce Act, 49 U.S.C. 1017(b)

Enacted Subsequent to 1938

Act of Sept. 6, 1966, 5 U.S.C. 8132
Federal Crop Insurance Act, 7 U.S.C. 1507(c) (added in 1980)
Housing Act of 1959, 12 U.S.C. 1715u(b)(1)
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2607(d)(2)
Right to Financial Privacy Act of 1978, 12 U.S.C. 3417(a)(4)
Right to Financial Privacy Act of 1978, 12 U.S.C. 3418
Securities Exchange Act of 1934, 15 U.S.C. 78u(h) (added in 1980)
National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1400(a)
Consumer Credit Protection Act, 15 U.S.C. 1681n(3)
Consumer Credit Protection Act, 15 U.S.C. 1681o(2)
Consumer Credit Protection Act, 15 U.S.C. 1691e(d)
Consumer Credit Protection Act, 15 U.S.C. 1692k(a)
Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1918(a)

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1989(a)(2)

Alaska National Interest Lands Conservation Act, 16 U.S.C. 3117(a)

Welfare and Pension Plans Disclosure Act, 29 U.S.C. (1970 ed.) 308(c)

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431(c)

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(g)(1)

Multiple Mineral Development Act, 30 U.S.C. 526(e)

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9612(c)

National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. (& Supp. V) 5412(b)

Alaska National Interest Lands Conservation Act, 43 U.S.C. (Supp. V) 1631(c)

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1810(c)

Statutory formula—
Statutes listing costs and attorneys' fees separately

Enacted Prior to 1938

Act of Feb. 26, 1853, 28 U.S.C. 1927

Act of Mar. 3, 1887, 48 U.S.C. 1506 (added in 1897)

Enacted Subsequent to 1938

Bankruptcy Act of 1978, 11 U.S.C. 303(i)

Bankruptcy Act of 1978, 11 U.S.C. 363(n)

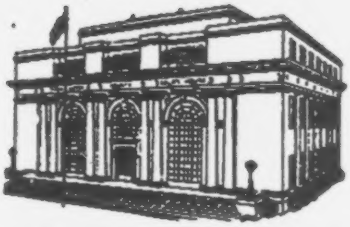
Bankruptcy Act of 1978, 11 U.S.C. 523(d)

Housing Act of 1961, 12 U.S.C. 1715k(h)(6)

Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1709(c)

Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. 3608(d)
Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. 3611(d)
Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2632(a) and (b)
Act of Dec. 22, 1974, 25 U.S.C. 640d-27(a) and (b)
Act of Oct. 14, 1966, 25 U.S.C. 1102
Act of Oct. 14, 1966, 25 U.S.C. 1132
Act of Oct. 24, 1967, 25 U.S.C. 1152
Act of Sept. 21, 1968, 25 U.S.C. 1183
Act of Mar. 18, 1972, 25 U.S.C. 1261
Act of Oct. 6, 1972, 25 U.S.C. 1300
Act of Oct. 25, 1972, 25 U.S.C. 1300d
Tax Reduction and Simplification Act of 1977, 42 U.S.C. (Supp. V) 662(b)
Atomic Energy Act of 1954, 42 U.S.C. 2184
Fair Housing Act of 1968, 42 U.S.C. 3612(c)
Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. V) 1818(c)(1)(C)
Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11708(c)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10009



Pennington County

BOARD OF COUNTY COMMISSIONERS

* * * COUNTY COURT HOUSE * * * RAPID CITY, SOUTH DAKOTA 57701 * * *

September 23, 1983

The Honorable Senator Larry Pressler
Rushmore Mall Office
Rapid City, SD 57701

Senator Pressler:

Pennington County requires that County Commissioners serve on the Board of Directors of agencies that are funded by the County's tax dollars. I serve on the County Health Board, the Mental Health Board, a Detox Center Board, an Emergency Ambulance Board and the West River Rural Water Systems Board. All of these Boards are vulnerable to collective and personal liability suits. As a result, each and every Board buys liability insurance for errors and omissions.

As a member of the Board, I am listed on each policy. Unfortunately, this may not be enough to protect me. John Q. Citizen picks up the total bill directly with tax dollars for the County Commission and indirectly through service costs on the remainder of the Boards. The estimated cost for four boards (cost not available for West River Rural Water System) is approximately $19,100 per year **. The Pennington County Board of Commissioners consists of five members, all of whom serve on an equal number, but different boards. The cost could and should be multiplied by five, plus department heads who are also insured. This is for a very rural county in a very rural state. The risk of serving in public office is considerable and is reflected in the reluctance to serve and in the rapid turnover of members. It contributes to the hidden cost of inexperienced members. It contributes to overly-prudent decisions and inactive boards. Who can blame them for inaction when they are faced with the prospect of lawsuits or loss of personal assets.

We need additional credit for acting in good faith. Just recently, Pennington County and the Commissioners individually, were sued by a welfare client. It is my opinion that the Plaintiff lied about a good share of his personal history. He brought suit and requested a trial by jury. Remember, he had nothing to lose. The taxpayers pay for his attorneys fees and the court costs. We paid him off with an amount slightly less than the court costs. It was cheaper than a trial without the risk of additional attorneys fees if he should appeal. I think the requested settlement was calculated on the Plaintiff's as well as the County's part. We need additional protection against excessive attorneys fees.

** This is the total cost per Board, not member. Also, there would be additional costs for staff insurance

The Pennington County Commission has been notified by the present florensic medical examiner that he will no longer do autopsies. He sites court testimony and liability as his reasons for quitting. We will now have to pay transportation from Sioux Falls or out of state for our florensic services. The Coroner's budget went up 200% for 1984 and it may not be enough. It is increasingly difficult to find technicians at any price to do blood alcohol tests for DWIs. A relatively simple test which carries undue liability. Counties are hard-pressed to provide necessary services.

Excessive lawsuits and attorneys fees are a cancer which you can help cure. The Pennington County Board of Commissioners support SB 141.

Senator Pressler, thank you for the opportunity to speak to this issue.

Yours truly,

Gladys Babcock

Gladys Babcock, Pennington Co. Commissioner
Box C2
Creighton, SD 57729

cc: file

GB/jl

RESOLUTION

Be it resolved that:

Whereas the several political subdivisions of the State of South Dakota have been faced with multiple law suits occasioned by 42 USC 1983 and 42 USC 1988 and

Whereas it is the consensus of this group that 42 USC 1983 and 42 USC 1988 and the enforcement thereof has resulted in grave financial burden of the several counties.

Now therefore be it resolved that the Association of County Commissioners of the State of South Dakota do hereby urge the Congress and particularly the Senate of the United States of America to support and pass correcitve legislation, particularly Senate Bill 81 and Senate Bill 141, to assist in the alleviation of the burden and thereby establish equal protection to all under the law.

Passed by unanimous vote by the Pennington County Board of Commissioners

The above Resolution was forwarded to the South Dakota Assoc. of County Commissioners for consideration at their Convention which is scheduled for Sept. 25-28.

BREVARD COUNTY LEAGUE OF MUNICIPALITIES

CAPE CANAVERAL
COCOA BEACH
COCOA
INDIAN HARBOUR BEACH
INDIALANTIC
MALABAR
MELBOURNE
MELBOURNE BEACH
MELBOURNE VILLAGE
PALM BAY
PALM SHORES
ROCKLEDGE
SATELLITE BEACH
TITUSVILLE
WEST MELBOURNE

"CITIES OF BREVARD WORKING TOGETHER"

July 21, 1983

Senator Strom Thurmond
Room 218
Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Thurmond:

The Brevard League of Municipalities has unanimously voted support of SB 141, which is now in the hands of your Committee on the Judiciary.

The two existing measures which 141 would amend hang over the heads of every local government like two ticking time bombs. The 1871 Act places no limit on municipal liability for damages in Civil Rights cases, and court decisions have removed "good faith" as a defense. Because the courts have been inconsistent in cases of marginal constitutionality, city governments have been made to operate in a legal limbo. The first part of Senate Bill 141 would restore "good faith" as a defense.

Lawyers have discovered that the 1871 Act provides a fruitful hunting ground, and the 1976 Act places no curbs and provides no guidelines on the amount of legal fees a court can award if a lawyer wins a Civil Rights suit against a local government. Senate Bill 141 would provide some essential restraints and a measure of reciprocity by allowing local governments to recover damages in the case of frivolous suits.

We are sending copies of this letter to the other members of the Committee on the Judiciary for their information, and also to our Florida Senators.

Cordially yours,

David R. Brown
President

DRB:vbt

RESOLUTION NO. 83-31

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROCKLEDGE, FLORIDA, SUPPORTING AMENDMENT OF THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, 42 U.S.C. SECTIONS 1983 AND 1988.

WHEREAS, the City Council of the City of Rockledge, Florida, is concerned that the Civil Rights Act of 1871, 42 U.S.C. Section 1983, as construed in recent decisions by the Supreme Court of the United States, will adversely affect all local governments in ways which were not brought to the attention of the Court in recent cases; and

WHEREAS, it is apparent that liability for attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, in Section 1983 actions has developed into a major component of liability under Section 1983; and

WHEREAS, the manner in which Section 1983 has been implemented by the courts encourages the filing of frivolous Section 1983 suits against local governments; and

WHEREAS, excessive judicial intrusion caused by the strict liability concepts of recent Supreme Court decisions, in conjunction with the availability of attorneys' fees, will distort municipal decisionmaking and restrict the independence of local governments and their ability to respond to community needs.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF ROCKLEDGE, FLORIDA, AS THE GOVERNING BODY OF SAID CITY:

SECTION 1. That said City Council fully supports S.141 to amend Sections 1983 and 1988, as approved by the Sub-committee on the Constitution on April 22nd, 1982, and, further, urges the U.S. Senate Judiciary Committee to take prompt action to approve this bill and further pursue its passage by the Congress of the United States of America.

SECTION 2. That copies hereof be forwarded to members of the Florida Congressional delegation and members of the Judiciary Committee of the United States Senate.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Rockledge, Florida, this 20th day of July, A.D. 1983.

John J Oates
Mayor - City of Rockledge, Florida

Richard K Blake
Chairman - City Council of the City of Rockledge, Florida

ATTEST:

S. Hamilton
City Clerk

This Resolution sponsored by:

Councilman Larry L. Schultz

FRATERNAL ORDER OF POLICE
NATIONAL LEGISLATIVE COMMITTEE
2305 COVINA PLACE, N.W.
ALBUQUERQUE, NEW MEXICO 87104
Phone: (H) (505) 842-9511
(O) (505) ~~766-4513~~ 298-1876

1916

RICHARD A. BOYD
NATIONAL PRESIDENT
GILBERT G. GALLEGOS
CHAIRMAN
MICHAEL LUTZ
ART STONE

February 14, 1984

Senator Orrin G. Hatch
United States Senate
Russell Building
Washington, D.C. 20510

REF: S-141

Dear Sir:

The Fraternal Order of Police is a nationwide organization, consisting of over 160,000 members in 34 states. The legislation (S-141) you have introduced is of great interest to our organization.

In all probability, law enforcement officers are subject to most of the civil suits filed under 42 U.S.C. 1983. As you know, many of the suits are frivolous or have no real substance. The FOP agrees that some officers overstep their bounds of authority and should be subject to civil actions as provided for in the statute. However, we feel that too many unjustified suits are being filed which, of course, bogs down the judicial system. It is time to amend the statute, and bring the situation under control.

John Ruekelshaus, the FOP National Attorney, has reviewed S-141 and has made some suggestions for change in the bill. I feel these changes would clarify the statute and make for a stronger bill. I have enclosed his suggestions, and hope that you and your staff review them and hopefully make some changes in the bill.

The FOP supports S-141, and is willing to assist you in getting the bill passed through Congress. If you or your staff have any questions, please contact me.

Sincerely,

Gilbert Gallegos

GILBERT GALLEGOS, Chairman
National Legislative Committee

GG/im
Encl.
cc: Randy Rader
Constitution Subcommittee

99TH CONGRESS
1ST SESSION

S. __________

To provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983 and 1988) relating to civil actions for the deprivation of rights; to provide a two (2) year statute of limitations; to prohibit recovery of punitive damages against law enforcement officers and to proscribe methods or limitations on award of attorney fees and other costs.

IN THE SENATE OF THE UNITED STATES

A BILL

To provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983 and 1988) relating to civil actions for the deprivation of rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting "(a)" before "Every" and by adding at the end thereof the following new subsections:

"(b) In any action brought under this section, damages shall not be awarded against any government entity if the court finds that the officials thereof were acting in good faith."

"(c) Civil actions shall commence within two (2) years after the cause of action hereunder has accrued and not afterwards."

"(d) In any action brought under this section, punitive or exemplary damages shall not be awarded against any law enforcement officer or official."

"(e) A judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee whose conduct gave rise to the claim resulting in that judgment or settlement. The governmental entity shall pay any judgment, compromise, or settlement of a claim or suit against an employee whose act or omission causing the loss is within the scope of his employment, regardless of whether the employee can or cannot be held personally liable for the loss. The governmental entity shall provide counsel for and pay all costs and fees incurred by or on behalf of any employee in defense of a claim or suit for a loss occurring hereunder because of any acts or omissions within the scope of his employment, regardless of whether the employee can or cannot be held personally liable for the loss."

SEC. 2. The Revised Statutes are amended by adding after section 722 (42 U.S.C. 1988) the following new section:

"LIMITATIONS ON AWARDS OF ATTORNEY'S FEES AND OTHER COSTS

"SEC. 722A. (a) Attorney's fees should be awarded to the prevailing plaintiff in any action pursuant to section 722 (42 U.S.C. 1988) unless special circumstances would render such an award unjust. Attorney's fees should be awarded to the prevailing defendant if the court finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so, even though there was no subjective bad faith.

"(b) Where a party has prevailed on a pendent claim or Federal statutory claim not covered under section 722 (42 U.S.C. 1988) but which is joined under the Federal Rules of Civil Procedure to a claim that is under such section, the court may only award attorney's fees if it finds that the claim covered under section 722 of the Revised

Statutes (42 U.S.C. 1988) has sufficient merit to have justified a reasonable person to have brought such claim as a separate suit.

"(c) No fee shall be awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the relief ultimately awarded by the court.

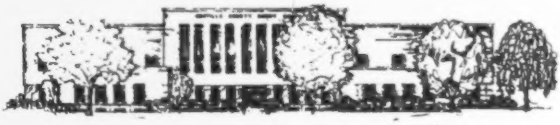
"(d) No attorney's fees may be awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) where the court finds the claims to be moot due to a change in government policy if the court finds that the pendency of the litigation was not a material factor for such change.

"(e) The amount of fees awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) shall be based upon a reasonable market rate for time reasonably spent on the claims in which the plaintiff prevailed or which qualify for fees under subsection (b). No awards based on bonuses or multipliers may be made by the court in any award under section 722 of the Revised Statutes (42 U.S.C. 1988).

"(f) A party seeking an award of fees and other expenses under section 722 of the Revised Statutes (42 U.S.C. 1988) shall, within thirty days of final judgment in the action, subject to modification by agreement of the parties or by court order, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section. The application shall state the amount of fees and other expenses sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party, stating the actual time expended, the precise nature of the work done during each increment of time expended, and the rate at which fees and other expenses were computed."

UMATILLA COUNTY BOARD OF COMMISSIONERS

COMMISSIONERS
Bob Ten Eyck
A. L. "Bud" Draper
Bill Hansell



STAFF
Stuart Spring
Legal Counsel
Marcia Wells
Office Manager
Debbie Warlick
Personnel

216 S.E. 4th P.O. Box 1427 Pendleton, Oregon 97801
Phone 503/276-7111

October 28, 1983

Mr. Randy Rader, Esquire
Subcommittee on the Constitution
SD-212
Washington, D.C. 20510

Dear Randy:

Again, I want to apoligize for interrupting your busy schedule last week and thank you for the time you gave me.

Enclosed please find material requested on our past jail suit. This has been a most frustrating experience:

1) Prior to the time of filing the suit, thousand of dollars were spent on a plan for a new facility. This suit actually delayed the construction.

2) Mr. Haber (the attorney for the plaintiff) came to town and interviewed all our prisoners to find someone whom he could represent. One of the prisoners he found was on work release, working a night job so he checked in at 8:00 A.M. and was released at 4:30 P.M. with one day a week off. How do you violate his rights?

3) When Judge Reddin, a Federal Judge, came to town, one of the things he told us, as commissioners, was to settle out of court as he decided three weeks ago that we were guilty. This was before he talked to the sheriff, the commissioners, or seen the facility.

4) Judge Reddin denied a jury trial.

5) Judge Reddin ignored all of the county's testimony.

6) Mr. Haber has no office space, only a phone in his own home; no staff, no employees and typing is done by office power; he works out of the University of Oregon Library.

7) Mr. Haber, by his own testimony, has received $125 per hour for only two hours in his entire career.

8) Mr. Scott McAllister, of the Oregon State Attorney General's Office, testified that the fees were reasonable. He is a former employee of Judge Reddin.

9) As per the enclosed news clipping, you can see that Haber's clock is still running, but the article does not say that he ordered 15 beds be removed from our new facility which will reduce our capacity from 70 to 55. Both Judge Reddin and Haber had approved our plan. When will this ever stop?

This is happening to other Oregon counties. Please read exhibit #1-Opinion. Our county had paid in excess of $30,000 in fees to our attorney. So you can see this has been a very expensive experience and the clock is still running.

If you need further assistance, please feel free to call. This is very important to our county and myself to see that these types of things are eliminated in the future.

Sincerely,

Robert Ten Eyck

Robert Ten Eyck, Chairman
Board of Commissioners

RTE:mw

Enclosures

County, inmates' lawyer negotiating

East Oregonian Oct 27-83

Details of jail lawsuit remain

By Bill Manny
of the East Oregonian

PENDLETON — The two-year-old story of Umatilla County's defense of its jail may be drawing to a resolution, but the final chapter has yet to be written.

And just how — and when — the tale will conclude is anyone's guess.

In August of 1981, four inmates filed suit against the jail in U.S. District Court alleging that conditions at the jail violated inmate constitutional rights.

The case came to trial in September 1982, and Judge James Redden ruled against the county — and in favor of the inmates who filed suit — in February of this year. In June, he awarded $306,884 to the inmates' attorney, Roy Haber of Eugene.

Those decisions were not the last word. Redden delayed final judgment until several issues — including inmate beds, provisions for medical treatment and access to the county's law library — could be worked out between Haber and the county.

District Attorney Dave Gallaher, who is representing the county commissioners in the case, said that Haber has been working with Sheriff Jim Carey on the details that remain to be worked out.

While he said the parties are nearing agreement, nothing has "crystallized." He said the county would continue negotiations with the Eugene attorney, and if there remain issues the two parties can't resolve, those issues would be taken up with Judge Redden in a hearing.

"If we end up having a hearing, it will be limited to one or two issues," Gallaher said.

He said the medical issue should be resolved since the jail received certification from the American Medical Association.

"We're confident that that's not a major problem and our program will be acceptable to the court, if not to Roy," Gallaher said.

Gallaher said he has heard nothing about Haber's intentions to ask the county to pay for his "post-adjudication" work. However, the district attorney did say Haber had indicated he intended to bill the county for the time spent on the work.

Haber mentioned possibly billing the county for the additional work last summer when he'd asked the county to assist him in setting up a trust fund to shelter part of the large award.

The county refused and sent the payment in one lump sum. Commissioner Bob Ten Eyck vowed to send a copy of the check to the federal and state tax officials.

Since the suit was filed, an addition to the jail has been completed and remodeling on the existing jail on the third floor of the courthouse is almost finished.

Ten Eyck said he fears the county may never move out from the suit's shadow. He said he worries that once the addition and remodeling are complete, Haber and the judge may refuse to accept the facility.

A 14 The Seattle Times Wednesday, April 4, 1984

EDITORIALS

The Seattle Times

AN INDEPENDENT NEWSPAPER
Founded August 10, 1896

Alden J. Blethen, 1896-1915 *C. B. Blethen, 1915-1941*
Elmer E. Todd, 1942-1949 *W. K. Blethen, 1949-1967*

John A. Blethen, Chairman of the Board
W. J. Pennington, President and Publisher

James B. King, Editor and Vice President
Herb F. Robinson, Editorial Page Editor
Michael R. Fancher, Managing Editor

GOOD INTENTIONS GONE AWRY

Windfall fees for civil-rights lawyers

"A lawsuit is a fruit tree planted in a lawyer's garden." — Old Italian proverb.

WHEN Congress acted in 1976 to award "reasonable" fees to lawyers in civil-rights cases, its good intentions were beyond dispute. The idea was to encourage attorneys to represent often-indigent victims of racial discrimination.

A report just published by the National Association of Attorneys General, however, makes it clear that those good intentions have gone awry.

Summarizing numerous cases and their interpretation by the courts in recent years, the association said the 1976 law has been distorted far beyond its valid purpose of providing greater access to the courts for disadvantaged civil-rights plaintiffs.

Many cases involving attorney-fee claims under the statute concern issues that have little to do with civil rights and are producing awards of windfall fees based not on a standard of "reasonable," but on what top corporation lawyers are being paid.

The U.S. Supreme Court ruled recently, for example, that Legal Aid Society attorneys who won a Medicaid-benefits suit against New York State were entitled to fees based on the prevailing market rate for lawyers in New York City.

The association's report was prepared by Attorneys General Francis Bellotti of Massachusetts and Ken Eikenberry of Washington.

As a local example of efforts to win windfall fees for plaintiffs' counsel, Eikenberry mentioned an exorbitant claim for $1.4 million for attorneys who brought a sex-discrimination case against Washington State University's athletic program. A trial court fortunately reduced the claim to $150,000.

Urging the White House and Congress to check runaway costs, which ultimately come out of taxpayers' pockets, the attorneys general said the intent of the original law need not be changed by enacting such reforms as putting a cap on individual fees, and basing fees to publicly funded legal-services organizations on actual costs of litigation.

3/29/84 The Spokane Chronicle

Attorneys debate legal-fee award law

By FRANCES HUESSY
Staff writer

A local civil-rights attorney disagrees with a report by state Attorney General Ken Eikenberry on what the National Association of Attorneys General thinks is an improper multimillion-dollar bite from state treasuries.

At issue are the fees attorneys may request under the 1976 Civil Rights Attorneys Fees Awards Act. To Eikenberry and the association, the act is being abused, and threatens "to bury the underlying civil-rights claims that the act was intended to protect."

The association wants President Reagan to urge Congress to make nine changes in the way the law is applied.

Spokane attorney Bryan Harnetiaux disagreed at a "Public Issues and the Law" forum Wednesday at Gonzaga University School of Law.

Representing the attorney general's office at the forum was Owen F. Clarke Jr., chief of the Spokane office.

The act was intended "to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs ... by affording successful civil-rights plaintiffs the opportunity to recover what it costs them to vindicate these rights in court," the report said.

According to Clarke, who drew many of his remarks from the report, adverse applications of the act include encouraging frivolous non-civil-rights claims and deterring settlement of meritorious claims.

Harnetiaux, calling himself a plaintiffs' lawyer, said attorneys like him generally do not take on frivolous cases in the hope of being awarded a high fee.

Most civil-rights cases have been employer-related, and plaintiffs normally are challenging the policies or actions of a company represented by retained attorneys who will be paid regardless of the outcome of the case, he said. Chances of winning frivolous cases are slim, he added.

Included in the association's recommendations are:

- Congress should amend the act to require that courts apportion fee awards according to the degree of success attained by the prevailing party.
- Congress should cap fees at $75 an hour.
- Congress should prohibit bonuses and multiplier factors. Attorneys currently can request not only hourly fees, but bonuses for extra difficulties.

Harnetiaux said he thought it was "naive to think Congress could come up with a formula in attorney fees."

Clarke said the act has raised major problems that can't adequately be addressed on a case-by-case basis in the courts.

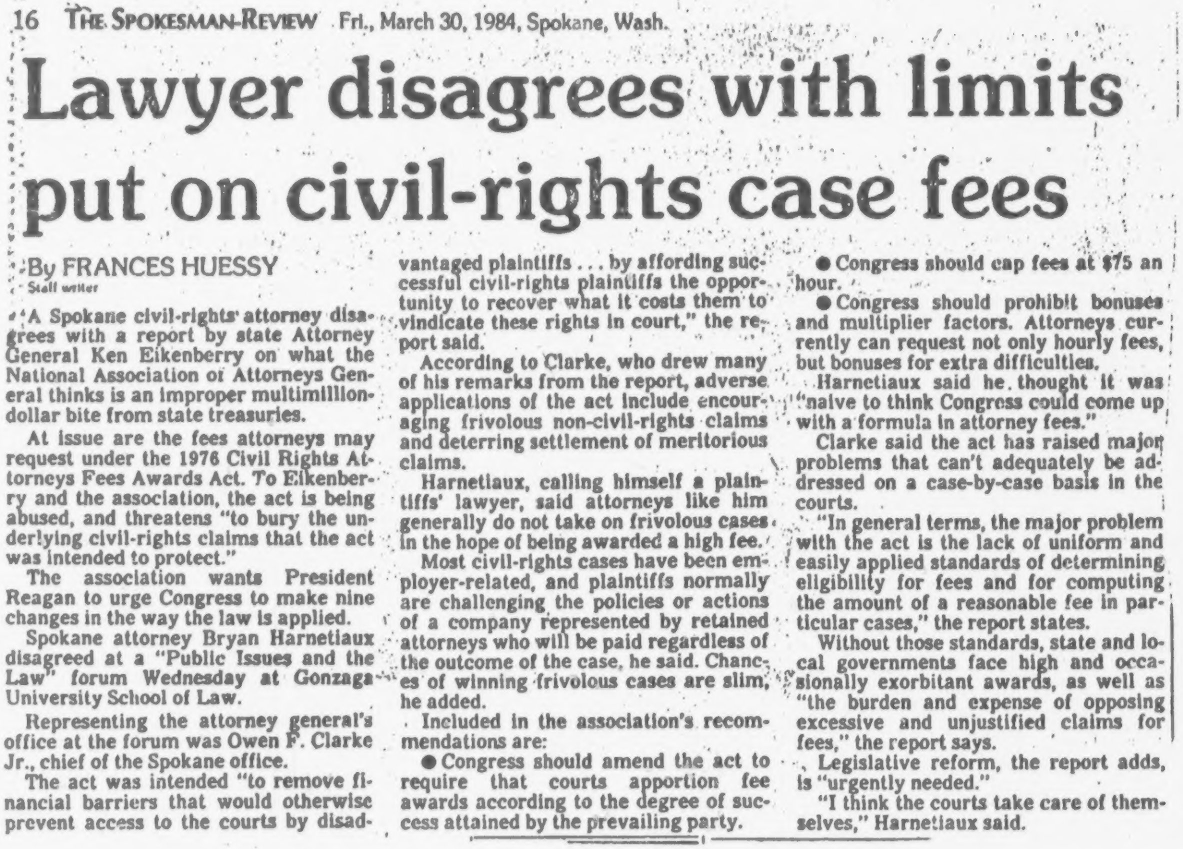
"In general terms, the major problem with the act is the lack of uniform and easily applied standards of determining eligibility for fees and for computing the amount of a reasonable fee in particular cases," the report states.

Without those standards, state and local governments face high and occasionally exorbitant awards, as well as "the burden and expense of opposing excessive and unjustified claims for fees," the report says.

Legislative reform, the report adds, is "urgently needed."

Criticizing the report, Harnetiaux said the National Association of Attorneys General has not recognized "how the focus of the litigation has fared during this period of time (since 1976). They have isolated and pinpointed only the attorneys' fees (question)," without regard for the progress of civil-rights litigation, he said.

The association compiles and disseminates information on legislative, agency and judicial developments having an effect on state legal affairs.



16 THE SPOKESMAN-REVIEW Fri., March 30, 1984, Spokane, Wash.

Lawyer disagrees with limits put on civil-rights case fees

By FRANCES HUESSY
Staff writer

A Spokane civil-rights attorney disagrees with a report by state Attorney General Ken Eikenberry on what the National Association of Attorneys General thinks is an improper multimillion-dollar bite from state treasuries.

At issue are the fees attorneys may request under the 1976 Civil Rights Attorneys Fees Awards Act. To Eikenberry and the association, the act is being abused, and threatens "to bury the underlying civil-rights claims that the act was intended to protect."

The association wants President Reagan to urge Congress to make nine changes in the way the law is applied.

Spokane attorney Bryan Harnetiaux disagreed at a "Public Issues and the Law" forum Wednesday at Gonzaga University School of Law.

Representing the attorney general's office at the forum was Owen F. Clarke Jr., chief of the Spokane office.

The act was intended "to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs . . . by affording successful civil-rights plaintiffs the opportunity to recover what it costs them to vindicate these rights in court," the report said.

According to Clarke, who drew many of his remarks from the report, adverse applications of the act include encouraging frivolous non-civil-rights claims and deterring settlement of meritorious claims.

Harnetiaux, calling himself a plaintiffs' lawyer, said attorneys like him generally do not take on frivolous cases in the hope of being awarded a high fee.

Most civil-rights cases have been employer-related, and plaintiffs normally are challenging the policies or actions of a company represented by retained attorneys who will be paid regardless of the outcome of the case, he said. Chances of winning frivolous cases are slim, he added.

Included in the association's recommendations are:

- Congress should amend the act to require that courts apportion fee awards according to the degree of success attained by the prevailing party.
- Congress should cap fees at $75 an hour.
- Congress should prohibit bonuses and multiplier factors. Attorneys currently can request not only hourly fees, but bonuses for extra difficulties.

Harnetiaux said he thought it was "naive to think Congress could come up with a formula in attorney fees."

Clarke said the act has raised major problems that can't adequately be addressed on a case-by-case basis in the courts.

"In general terms, the major problem with the act is the lack of uniform and easily applied standards of determining eligibility for fees and for computing the amount of a reasonable fee in particular cases," the report states.

Without those standards, state and local governments face high and occasionally exorbitant awards, as well as "the burden and expense of opposing excessive and unjustified claims for fees," the report says.

Legislative reform, the report adds, is "urgently needed."

"I think the courts take care of themselves," Harnetiaux said.

The Mandate, The Mayor, and the Menance of Liability

By Cynthia Cates Colella

The former elected officials of one small Kansas town had a healthy respect for their potential liability under the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Upon learning that they could be held personally liable for violations of Constitutional rights of individual citizens, they sought protection through personal liability insurance. When they did, they found that the quoted insurance premium exceeded the total town budget. With true heartland aplomb, they voted to disband the town.[1]

While the virtue of self-assurance is by no means limited to the heartland, one can hardly imagine the officialdom of New York, Chicago, or Los Angeles voting to throw in the municipal towel. Yet, the furor which has resulted from recent Supreme Court decisions based on Section 1983—in many instances, nothing short of apocalyptic—suggests that just such a scenario is possible, if not probable. At the very least, critics claim that the law, as presently interpreted, could result in serious inertia at the state and local levels. And, like a haunting, if such dire predictions materialize, they will be the legacy of a single sentence passed into law over a century ago.

Section 1983:
Revenge of the Radical Republicans

Like biblical lineage, the Civil Rights Act of 1866 begat the 14th Amendment, the 14th Amendment begat the Civil Rights Act of 1871, the Act of 1871 begat an amendment in 1875, and the amendment begat Section 1983, a seemingly simple sentence, which, in its old age, has been doing a lot of begatting itself—begatting some condemnation, some commendation, and a great deal of consternation.

Passed in the waning days of Radical Reconstruction—a period not particularly "conducive to the enactment of carefully considered and coherent legislation,"[2] [redacted] Hence, the law, as codified, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[4]

No doubt, the Congressional authors of the legislation were concerned primarily with securing equal protection of the laws and guarantees of due process for the recently freed black population. Indeed, over the next few decades, court interpretation supported that concern—if not adequately, then, at least almost exclusively. [redacted]

---

[1] Martin J. Jaron, Jr., "The Threat of Personal Liability Under the Civil Rights Act: Does It Interfere with the Performance of State and Local Government?" The Urban Lawyer, Vol. 13, No. 1, Winter 1981, p. 1.

[2] United States v. Williams, 341 U.S. 70 (1951).

[3] Section 1 of the 14th Amendment reads: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

[4] Title 42 U.S.C. Section 1983.

[5] In the late 18th and early 19th centuries interpretation of the 14th Amendment engendered a revolution in due process, while the 1940s, 1950s, and especially, the 1960s witnessed the drive to apply most of the Bill of Rights protections to the states through the Amendment.

Amendment rather quickly (and continuously) came to be seen as the most significant of Constitutional provisions—"not even second in significance ~~to the~~ original document itself"[6] ~~—its~~ remedial counterpart, ~~Section 1983, lay practically dormant for nearly a century—cited by the Supreme Court a mere 36 times in the first 90 years of its existence.~~[7] Obviously, then, ~~the Court, though experiencing often radical changes in leadership and ideological bent, chose to view the statute solely as a remedy for gross Constitutional violations—a "loosely and blindly drafted" remedy to be broached only with a great deal of trepidation.~~

Even had the Court been willing to interpret broadly what constituted deprivation under color of state law, longstanding common law immunity shielding state and local officials and municipalities on the basis of their "good faith" and the 11th Amendment offering absolute immunity to the states would have rendered the bringing of Section 1983 suits virtually meaningless for the purposes of collecting damages. Jurisdictions and their officials, therefore, had little to fear due, on the one hand, to narrow statutory construction and, on the other, to broad common law construction and Constitutional prohibition.

If, as many now suggest, current interpretation of Section 1983 has left municipalities and their strained treasuries vulnerable to every manner of attack, interpretation, prior to the 1960s, was clearly in the other direction—often making it exceedingly difficult for even heinously wronged individuals to receive just remedies. Such relative freedom from the need to consider individual rights when making or implementing policy could not but help, in some cases, to lead to insensitivity to, if not outright violation of, Constitutional protections. And, protection of individual rights is of equal if not greater consequence to the continued viability of American Constitutionalism as adherence to the principles of federalism. Thus, the underutilization or disregard of Section 1983—and civil rights statutes generally—often led to badly unbalanced policy, for "[w]hatever other concerns should shape a particular official's actions, certainly one of them should be the Constitutional rights of individuals who will be affected by his actions. . . ."[8]

The Initial Unshackling

In 1961, 13 Chicago police officers, in a flagrant misuse of authority, entered a home without warning and forced its occupants to stand naked while the premises were virtually torn apart in a search effort. The subsequent court action, brought against both the city and the police officers under Section 1983, culminated in the Supreme Court case of ~~Monroe v. Pape.~~[9] The resulting landmark opinion had three major effects:

- it significantly expanded the scope of the phrase, "under color of state [law]," for the officers involved clearly had not acted according to any state policy;
- in ruling that municipalities were not "persons" under Section 1983, it directed potential litigants to file suits against individual officials; and
- rather predictably, it produced a rush of that most cherished of American pastimes—going to court.[10]

While Monroe marked the initial unshackling of Section 1983's vast potential, it still effectively precluded many suits "because of the difficulties presented by having to identify individual officials responsible for a violation, finding responsible officials with financial means to pay substantial judgments, a jury's natural sympathy for 'an official who is perceived to be under attack for doing what he thought to be his job,' and the good faith defense of officials to a Section 1983 action."[11]

Municipalities as "Persons"

Seldom do legal concepts remain static and "personhood" is no exception. Thus, 17 years following Monroe, the Court had reason to reevaluate application of that concept and thereby nudge local governments somewhat further into the "'Wonderland' of Section 1983 liability."[12] In a significant reversal of previous policy, the Court declared that municipalities could indeed be characterized as Section 1983 "persons." ~~And, though it would not have been impossible prior to 1978 to assert a direct cause of action against a locality,~~[13] ~~Monell v. Department of Social Services,~~[14] ~~promised to make the bringing of municipal liability suits easier and, consequently, more attractive.~~

~~In effect, the Monell decision established a number of "touchstones" that would trigger a Section~~

---

[6] Bernard Schwartz, "The Amendment in Operation: A Historical Overview," in The Fourteenth Amendment, ed by Bernard Schwartz, New York University Press, 1970, p. 29.

[7] Richard G. Carlisle, "Owen v. City of Independence: Toward? Constructing a Model for Municipal Liability After Monell," The Urban Lawyer, Vol 12, No 2, Spring 1980, p. 293.

~~Stefanelli v. Minard, 342 U.S. 117 (1951).~~

[8] Note, Developments in the Law: Section 1983 and Federalism," 90 Harvard Law Review, 1133, 1224 (1977) as cited in Owen v. City of Independence, 445 U.S. 622 at n. 41.

[9] 365 U.S. 167 (1961).

[10] While specific data on Section 1983 filings has not been systematically collected, the Administrative Office of the United States Courts reported a veritable explosion in post-Monroe private civil rights filings. Thus, such filings, excluding suits against the U.S. or its officers, increased from 296 cases in 1961 to 8,130 cases by 1979. Jaron, "The Threat of Personal Liability Under the Federal Civil Rights Act," p. 2.

[11] Robert H. Freilich, Jay Rushing, and Douglass F. Noland, "1978-79 Annual Review of Local Government Law: Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty," The Urban Lawyer, 11, Fall 1979, p. 549.

[12] Ibid., 548.

[13] In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court declared that even absent a statute which authorizes a remedial cause of action for Constitutional injury, the federal courts could allow such action directly under the Fifth and 14th Amendments. Although the Bivens case involved federal employees, a number of lower court decisions implied that a similar rationale might be applied to localities.

[14] 436 U.S. 658 (1978).

> Seldom do legal concepts remain static and "personhood" is no exception.

[redacted]

Demise of the "Good Faith" Defense

> [W]e can discern no "tradition so well grounded in history or reason" that would warrant the conclusion that in enacting Section 1 of the Civil Rights Act, the 42nd Congress ~~*sub silentio*~~ extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended to so limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights, . . ." we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.[19]

From slow beginnings, the accumulated force of judicial opinions may build to fast-paced finales. Thus, [redacted]

[redacted] The violator—the City of Independence through the official acts of its city manager and city council members—was deemed liable for those damages and could not assert the "good faith" of its officials to avoid liability. Though the majority justices went to great lengths to establish continuity between Owen and previous Section 1983 decisions, most commentators viewed the opinion as a dramatic departure from the past—a departure with serious and costly implications for cities across the nation.

[redacted]

First, by virtue of denying cities a good faith defense, it imposed upon them strict liability for damages. This is particularly burdensome in the realm of Constitutional violation since the fluidity of Constitutional interpretation, the constant expansion of Constitutional rights, and the often arcane points of Constitutional law combine to make it nearly impossible for city officials to know when and if they have committed a minor violation. For instance, in the Owen case, city officials had no way of knowing they had acted unconstitutionally since "Supreme Court decisions declaring a right to . . . a hearing were issued weeks after Chief Owen had been fired."[20] Although court expansions in the scope of rights protected by the Constitution are to be applauded and though no one would suggest that blatantly or obviously unconstitutional acts such as racial or sexual discrimination or denial of religious freedom should go uncorrected, the Owen holding appears to ascribe to the average municipal agent an above average ability to anticipate future refinements in Constitutional law.

Second, by implication, the decision appears to extend municipal liability for "official policy" to liability for "official conduct." Owen's Constitutional deprivation resulted from the actions and inactions of the city manager and city council and the arguable indiscreet statements of a council member. Those circumstances and the resulting decision caused a mystified Court minority to respond sarcastically that "[t]he statements of a single councilman scarcely rise to the level of municipal policy."[21]

Finally, in practical effect, the Court's decision to make cities liable for damages imparts to Section 1983 judgments three of the more onerous characteristics of federal mandates: intrusiveness, excessive

---

[redacted]

[17] Monell, 436 U.S. 658 (1978).

[18] For some time after Monell, most lower court cases held that qualified, good faith immunity did indeed apply to localities. J. Devereaux Weeks, "Personal Liability Under Federal Law: Major Developments Since Monell," The Urban Lawyer, 12, Spring 1980, p. 264.

[19] Owen v. City of Independence, Missouri, et al, 455 U.S. 622 (1980).

[20] Aaron A. Wilson, Samuel Gorlick, and George F. Knox, Jr., The Local Government Liability Explosion and a Plan to Cope With It; Report and Recommendations By the Committee to Study Creation of a National Municipal Legal Defense Fund, Washington, DC, National Institute of Municipal Law Officers, 1981, p. 13.

[21] Justice Powell dissenting for himself, the Chief Justice, Justice Stewart, and Justice Rehnquist in 455 U.S. 622 (1980).

Figure 1

Local Governments Reporting Civil Rights Claims For All Kinds Of Damages

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Arizona			
Phoenix	$160,000,000	665,000	$ 228,508,000
Tempe	2,550,000	84,000	23,113,000
Tucson	1,865,000	296,000	100,979,000
Arkansas			
DeQueen	2,599,150	3,863*	
California			
Los Angeles	200,000,000	2,727,000	1,158,197,000
Los Angeles County	59,228,000	6,987,000	2,861,180,000
El Segundo	7,110,000	15,000	10,228,000
Marin County	5,000,000	220,000	66,071,000
Roseville	4,260,000	20,000	8,710,000
Vallejo	3,242,600	71,000	17,011,000
San Bernardino	2,260,000	102,000	37,375,000
El Monte	1,600,000	68,000	12,430,000
San Diego	1,500,000	774,000	235,259,000
Duarte	1,200,000	15,000	2,721,000
San Leandro	1,002,732	67,000	18,981,000
Burbank	953,492	86,000	32,143,000
Oceanside	630,000	56,000	18,766,000
Orange Cove	600,000	3,392*	
Stockton	465,000	118,000	58,925,000
Vista	150,000	28,000	4,939,000
Sonora	50,000	3,100*	
Grover City	20,292	5,938*	
Sunnyvale	750	102,000	28,491,000
Colorado			
Aurora	25,302,000		
Denver	18,440,000	485,000	358,748,000
Colorado Springs	10,000,000	180,000	58,217,000
Northglenn	450,000	35,000	4,458,000
Golden	110,000	13,000	1,458,000
Delaware			
Delaware City	500,000	2,024*	
Symrna	500,000	4,243*	
District of Columbia	45,000,000	712,000	1,557,222,000
Florida			
Clearwater	5,150,000	87,000	29,193,000
Volusia County	3,865,000	207,000	22,936,000
Jacksonville	2,546,000	535,000	220,264,000
Miami Beach	2,500,000	94,000	44,613,000
Hallandale	1,500,000	33,000	9,599,000
Opa-Locka	300,000	14,000	3,077,000
Plantation	100,000	33,000	6,019,000
Pensacola	10,000	64,000	22,353,000
Deland	10,000	13,000	3,471,000
Venice	5,000	11,000	3,397,000
Georgia			
Albany	5,000,000	73,000	13,276,000
Douglasville	900,000	12,000	1,843,000
Augusta	155,000	54,000	17,871,000
Illinois			
Chicago	775,093,703	3,099,000	1,228,706,000
Joliet	33,822,000	74,000	19,194,000
Peoria	1,008,000	126,000	31,367,000
St. Charles	555,000	18,000	4,077,000
Willowbrook	290,000	1,169*	
North Aurora	$ 150,000	4,833*	
Waukegan	105,000	65,000	$ 16,969,000
Carbondale	60,000	23,000	8,669,000
Hoffman Estates	50,000	32,000	4,671,000
Oak Park	40,000	60,000	16,893,000
Iowa			
Algona	2,000,000	6,032*	
Cedar Rapids	1,887,251	109,000	46,274,000
Council Bluffs	1,601,200	59,000	19,581,000
Ames	1,550,000	43,000	16,818,000
Sioux City	270,000	86,000	32,528,000
Waterloo	200,000	78,000	24,977,000
Kansas			
Wichita	9,939,000	285,000	84,717,000
Emporia	1,860,000	22,000	5,699,000
Hutchinson	1,450,000	41,000	9,213,000
Merriam	600,000	11,000	1,905,000
Kentucky			
Berea	141,000	8,956*	
Owensboro	80,000	51,000	26,207,000
Winchester	10,000	16,000	6,162,000
Maine			
South Portland	140,000	23,000	11,523,000
Waterville	10,000	17,000	7,106,000
Maryland			
Anne Arundel County	116,000,000	344,000	233,548,000
Prince George's County	100,000,000	678,000	469,427,000
Baltimore	70,000,000	852,000	1,082,204,000
Hagerstown	3,272,000	37,000	7,858,000
Annapolis	10,000	32,000	9,734,000
Massachusetts			
Methuen	2,000,000	35,000	19,718,000
Michigan			
Flint	15,800,000	174,000	141,484,000
Saginaw	2,000,000	88,000	38,070,000
Kalamazoo	1,500,000	80,000	24,888,000
Plymouth	250,000	12,000	2,982,000
Muskegon County	250,000	157,000	31,972,000
Minnesota			
Duluth	1,800,000	94,000	46,877,000
Rochester	171,000	56,000	15,189,000
Mississippi			
Jackson	800,000	167,000	65,440,000
Missouri			
Columbia	201,000,000	63,000	16,248,000
Independence	40,000,000	111,000	28,133,000
St. Louis	40,000,000	525,000	294,518,000
Kansas City	12,500,000	473,000	254,463,000
Berkeley	7,040,000	15,000	3,252,000
Springfield	2,501,000	132,000	48,468,000
Jennings	480,000	18,000	3,583,000
Hazelwood	300,000	14,000	2,799,000
Nebraska			
Central City	1,500,000	2,803*	
Lincoln	600,000	183,000	58,785,000
Omaha	507,500	371,000	117,720,000

costs, and the potential displacement of preferred local activities.

One of the major effects of the Owen decision is certain to be in increase in Section 1983 litigation. Americans, as our preeminent observer, Tocqueville, noted nearly 150 years ago, love to go to court. And, it is no mean incentive to go even more frequently if telling it to the judge brings financial reward. While Section 1983 actions may be initiated, and even settled, in state courts, the measure is, in fact, a federal law, generally litigated in federal courts and settled by federal judges. Hence, an increase in such litigation ultimately will mean an increase in federal intervention into local affairs, a point of which Owen's dissenters were keenly aware:

> The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the states. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit Congressional action.[22]

In addition, in setting localities up as "convenient targets for capricious and expensive damage suits,"[23] Owen is likely to generate a further drain on already troubled municipal treasuries. In fact, the potential for such suits is astounding. Thus, discretionary municipal hiring and firing aside, local decisions in the areas of land use, zoning, licensing, permits, servicing, tax assessments, health and building codes, and environmental regulations may give (and in some cases have already given) rise to Section 1983 actions.[24] The potential of the cost aspect of Section 1983 "mandates" is nothing less than staggering— [redacted]*igure 1.*)

Finally, the Owen decision may work, both directly and circuitously, to displace preferred local activities and functions. In a direct sense, of course, the payment of damages distorts budgetary preferences. Pothole repair is far easier to put off than is payment of a court-ordered damage claim. Moreover, hedging one's bets against potential suits may in itself be enormously expensive.[26]

It is indirectly, however, that the Owen decision stands most seriously to distort local policymaking:

> Because [the Court's] decision will inject constant consideration of Section 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. . . . If officials must look over their shoulders at strict municipal liability for unknowable Constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by personal liability.[27]

Enter "Pandora's Mandate"

[redacted]

> The question before us is whether the phrase "and laws" as used in Section 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.[30]

The opinion thus treated as simple and obvious,[31] an issue over which both judicial and scholarly opinion had been sharply divided—with many contending that despite the phrase "and laws" Section 1983 referred only to Constitutional rights and derivative federal equal rights legislation. The Court's decision to explicitly add statutory mal-, mis-, and nonfeasance to the increasingly catch-all character of Section 1983—the opening of a legal can of worms, almost unprecedented in potential magnitude—was attended by a rash of adverse commentary, some of which came quite close to forecasting the ultimate demise of American federalism. Indeed, as the small sampling of laws in *Figure 2* points out, the ruling could affect the administration of a very wide range of federal programs.

"And laws" aside, the Court appeared to beg no end of business for itself, lower federal, and state courts by applying the Civil Rights Attorney's costs, and the potential displacement of preferred local activities.

---

[22] *Ibid.*

[23] City of New York, **Federal Program: 97th Congress**, New York, City of New York, 1981, p. 44.

[24] See for example: Anatolij Kushnir, "The Impact of Section 1983 After Monell on Municipal Policy Formulation and Implementation," **The Urban Lawyer**, 12, Summer 1980 and Freilich, Rushing, and Noland, "Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty."

[25] **Brief Amicus Curiae of the National Institute of Municipal Law Officers in Support of Petitioners, City of Newport, et al**, in the Supreme Court of the United States, October Term, 1980, **The City of Newport, Rhode Island, et al v. Fact Concerts, Inc., et al No. 80-396.** Actual figure of $4,116,311,276 represents estimate of claims against 169 municipalities based on the preliminary results of a survey undertaken by NIMLO on the impact of Section 1983 litigation on local governments.

[26] However, these astronomical insurance expenses are becoming less available to localities as more and more commercial carriers refuse to underwrite municipal risks due to the increased number and amount of claims and uncertain liability standards in the law. Jaron, "The Threat of Personal Liability Under the Federal Civil Rights Act," 19-20.

[27] Dissent in 455 U.S. 622 (1980).

[28] "Pandora's Mandate," Editorial, **The Wall Street Journal**, June 27, 1980, p. 24.

[29] 448 U.S. 1 (1980).

[30] *Ibid.*

[31] The Court offered as a major precedent a statement in **Edelman v. Jordan**, 415 U.S. 651 at 675 (1974) that the 1970 case of **Rosado v. Wyman**, 397 U.S. 397 (1970) "held that suits in federal court under Section 1983 are proper to secure compliance with the provisions of the **Social Security Act** on the part of participating states." The **Thiboutot** dissent, vigorously disagreeing that **Rosado** via **Edelman** acted as plain precedent, replied that ". . . **Rosado** established no such proposition of law. The plaintiffs in that case challenged a state welfare provision on Constitutional grounds, premising jurisdiction upon 28 U.S.C. Section 1343 (3), and added a pendent statutory claim.

One of the major effects of the Owen decision is certain to be in increase in Section 1983 litigation. Americans, as our preeminent observer, Tocqueville, noted nearly 150 years ago, love to go to court. And, it is no mean incentive to go even more frequently if telling it to the judge brings financial reward. While Section 1983 actions may be initiated, and even settled, in state courts, the measure is, in fact, a federal law, generally litigated in federal courts and settled by federal judges. Hence, an increase in such litigation ultimately will mean an increase in federal intervention into local affairs, a point of which Owen's dissenters were keenly aware:

> The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the states. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit Congressional action.[22]

In addition, in setting localities up as "convenient targets for capricious and expensive damage suits,"[23] Owen is likely to generate a further drain on already troubled municipal treasuries. In fact, the potential for such suits is astounding. Thus, discretionary municipal hiring and firing aside, local decisions in the areas of land use, zoning, licensing, permits, servicing, tax assessments, health and building codes, and environmental regulations may give (and in some cases have already given) rise to Section 1983 actions.[24] The potential of the cost aspect of Section 1983 "mandates" is nothing less than staggering—[redacted] *Figure 1.*)

Finally, the Owen decision may work, both directly and circuitously, to displace preferred local activities and functions. In a direct sense, of course, the payment of damages distorts budgetary preferences. Pothole repair is far easier to put off than is payment of a court-ordered damage claim. Moreover, hedging one's bets against potential suits may in itself be enormously expensive.[26]

It is indirectly, however, that the Owen decision stands most seriously to distort local policymaking:

> Because [the Court's] decision will inject constant consideration of Section 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. . . . If officials must look over their shoulders at strict municipal liability for unknowable Constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by personal liability.[27]

Enter "Pandora's Mandate"

[redacted]

> The question before us is whether the phrase "and laws" as used in Section 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.[30]

The opinion thus treated as simple and obvious,[31] an issue over which both judicial and scholarly opinion had been sharply divided—with many contending that despite the phrase "and laws" Section 1983 referred only to Constitutional rights and derivative federal equal rights legislation. The Court's decision to explicitly add statutory mal-, mis-, and nonfeasance to the increasingly catch-all character of Section 1983—the opening of a legal can of worms, almost unprecedented in potential magnitude—was attended by a rash of adverse commentary, some of which came quite close to forecasting the ultimate demise of American federalism. Indeed, as the small sampling of laws in *Figure 2* points out, the ruling could affect the administration of a very wide range of federal programs.

"And laws" aside, the Court appeared to beg no end of business for itself, lower federal, and state courts by applying the Civil Rights Attorney's

---

[22] Ibid.

[23] City of New York, Federal Program: 97th Congress, New York, City of New York, 1981, p. 44.

[24] See for example: Anatoly Kushnir, "The Impact of Section 1983 After Monell on Municipal Policy Formulation and Implementation," The Urban Lawyer, 12, Summer 1980 and French, Rushing, and Noland, "Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty."

[25] Brief Amicus Curiae of the National Institute of Municipal Law Officers in Support of Petitioners, City of Newport, et al, in the Supreme Court of the United States, October Term, 1980, The City of Newport, Rhode Island, et al v. Fact Concerts, Inc., et al No. 80-396. Actual figure of $4,116,311,270 represents estimate of claims against 169 municipalities based on the preliminary results of a survey undertaken by NIMLO on the impact of Section 1983 litigation on local governments.

[26] However, these astronomical insurance expenses are becoming less available to localities as more and more commercial carriers refuse to underwrite municipal risks due to the increased number and amount of claims and uncertain tort liability standards in the law. Jaron, "The Threat of Personal Liability Under the Federal Civil Rights Act," 19-20.

[27] Dissent in 455 U.S. 622 (1980).

[28] "Pandora's Mandate," Editorial, The Wall Street Journal, June 27, 1980, p. 24.

[29] 448 U.S. 1 (1980).

[30] Ibid.

[31] The Court offered as a major precedent, a statement in Edelman v. Jordan, 415 U.S. 651 at 675 (1974) that the 1970 case of Rosado v. Wyman, 397 U.S. 397 (1970) "held that suits in federal court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states." The Thiboutot dissent, vigorously disagreeing that Rosado via Edelman acted as plain precedent, replied that ". . . Rosado established no such proposition of law. The plaintiffs in that case challenged a state welfare provision on Constitutional grounds, premising jurisdiction upon 28 U.S.C. Section 1343 (3), and added a pendent statutory claim."

Figure 2

Small Sample Of Statutes That Could Give Rise To Section 1983 Actions Following Court's Decision In Maine v. Thiboutot

(Relevant enactments typically fall into one of three categories: (A) regulatory programs in which states are encouraged to participate, either by establishing their own plans of regulation that meet conditions set out in federal statutes, or by entering into cooperative agreements with federal officials; (B) resource management programs that may be administered by cooperative agreements between federal and state agencies; and (C) grant programs in which federal agencies either subsidize state and local activities or provide matching funds for state or local welfare plans that meet federal standards.)

A. Joint Regulatory Endeavors

1. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 973 (1972), as amended, 7 U. S. C. §§ 136 et seq.; see, e. g., 7 U. S. C. §§ 136u, 136v.
2. Federal Noxious Weed Act of 1974, 88 Stat. 2148 (1975), 7 U. S. C. §§ 2801-2813; see 7 U. S. C. § 2808.
3. Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666 (1935), as amended, 16 U. S. C. §§ 461-467; see 16 U. S. C. § 462 (e).
4. Fish and Wildlife Coordination Act, 48 Stat. 401 (1934), as amended, 16 U. S. C. § 661-666c; see 16 U. S. C. § 661.
5. Anadromous Fish Conservation Act, 79 Stat. 1125 (1965), as amended, 16 U. S. C. § 757a-757d; see 16 U. S. C. § 757a (a).
6. Wild Free-Roaming Horses and Burros Act, 85 Stat. 649 (1971), as amended, 16 U. S. C. §§ 1331-1340; see 16 U. S. C. § 1336.
7. Marine Mammal Protection Act of 1972, 86 Stat. 1027, as amended, 16 U. S. C. §§ 1361-1407; see 16 U. S. C. § 1379.
8. Wagner-Peyser National Employment System Act, 48 Stat. 113 (1933), 29 U. S. C. §§ 49 et seq.; see 29 U. S. C. § 49g (employment of farm laborers).
9. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. §§ 1201-1328; see 30 U. S. C. § 1253.
10. Interstate Commerce Act Amendments of 1935, 49 Stat. 548, as amended, 49 U. S. C. § 11502 (a)(2) (enforcement of highway transportation law).

B. Resource Management

1. Laws involving the administration and management of national parks and scenic areas: e. g., Act of May 15, 1965, § 6, 79 Stat. 111, 16 U. S. C. § 281e (Nez Perce National Historical Park); Act of Sept. 21, 1959, § 3, 73 Stat. 591, 16 U. S. C. § 410u (Minute Man National Historical Park); Act of Oct. 20, 1972, § 4, 86 Stat. 1302, 16 U. S. C. § 460bb-3 (b) (Muir Woods National Monument).
2. Laws involving the administration of forest lands: e. g., Act of March 1, 1911, § 2, 36 Stat. 961, 16 U. S. C. §§ 563; Act of Aug. 29, 1935, ch. 808, 49 Stat. 963, 16 U. S. C. §§ 567a-567b.
3. Laws involving the construction and management of water projects: e. g., Water Supply Act of 1958, § 301, 72 Stat. 319, 43 U. S. C. § 390b; Boulder Canyon Project Act, §§ 4, 8, 45 Stat. 1058, 1062 (1928), as amended, 43 U. S. C. §§ 617c, 617g; Rivers and Harbors Act of 1899, § 9, 30 Stat. 1151, 33 U. S. C. § 401.
4. National Trails System Act, 82 Stat. 919 (1968), as amended, 16 U. S. C. §§ 1241-1249; see 16 U. S. C. § 1246 (h).
5. Outer Continental Shelf Lands Act Amendment of 1978, § 208, 92 Stat. 652, 43 U. S. C. § 1345 (oil leasing).

C. Grant Programs

In addition to the familiar welfare, unemployment, and medical assistance programs established by the Social Security Act, these may include:

1. Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U. S. C. § 2011-2025; see e. g., 7 U. S. C. § 2020e-2020 (g).
2. Small Business Investment Act of 1958, § 602 (d)(1), 72 Stat. 698, as amended, 15 U. S. C. § 636(d).
3. Education Amendments of 1978, 92 Stat. 2153, as amended, 20 U. S. C. §§ 2701 et seq.; see, e. g., 20 U. S. C. §§ 2734, 2902.
4. Federal-Aid Highway legislation, e. g., 21 U. S. C. §§ 128, 131.
5. Comprehensive Employment and Training Act Amendments of 1978, 92 Stat. 1909, 29 U. S. C. §§ 801 et seq.; see, e. g., 29 U. S. C. §§ 823, 824.
6. United States Housing Act of 1937, as added, 88 Stat. 653 (1974), as amended, 42 U. S. C. § 1437 et seq.; see, e. g., 42 U. S. C. §§ 1437d (c), 1437j.
7. National School Lunch Act, 60 Stat. 230 (1946), as amended, 42 U. S. C. §§ 1751 et seq.; see, e. g., 42 U. S. C. § 1758.
8. Public Works and Economic Development Act of 1965, 79 Stat. 552, as amended, 42 U. S. C. §§ 3121 et seq.; see, e. g., 42 U. S. C. §§ 3132, 3151a, 3243.
9. Justice System Improvement Act of 1979, 93 Stat. 1167, 42 U. S. C. §§ 3701-3797; see, e. g., 42 U. S. C. §§ 3742, 3744 (c).
10. Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. §§ 5601 et seq.; see, e. g., 42 U. S. C. § 5633.
11. Energy Conservation and Production Act of 1976, 90 Stat. 1125, as amended, 42 U. S. C. §§ 6801 et seq.; see, e. g., 42 U. S. C. §§ 6805, 6836.
12. Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486 (1975), as amended, 42 U. S. C. §§ 6001 et seq.; see, e. g., §§ 6011, 6063.
13. Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U. S. C. §§ 1601 et seq.; see, e. g., §§ 1602, 1604 (g)-(m).

Source: Appendix compiled for Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist join, dissenting in Maine et al v. Thiboutot et vir. Supreme Court of the United States, Syllabus, Certiorari to the Supreme Judicial Court of Maine, No. 79-838, argued April 22, 1980—decided June 25, 1980, pp. 24-27.

Fees Award Act to statutory Section 1983 claims.[32] That law allows the prevailing party in, among others, Section 1983 cases, to collect "a reasonable attorney's fee as part of the costs."[33] Moreover, the probable increase in case filings will be attended by an even greater financial burden on losing jurisdictions, for attorney's fees may be a large—even the largest—part of the cost of a case. In fact, a recent case, involving $33,000 in back pay, resulted in an attorney's fee of $130,000.[34] And, in civil rights cases, the fees awarded have been getting increasingly more substantial.[35]

> “ In no small way, then Thiboutot may be viewed as a mandate aiding in the enforcement of other mandates or, a "mandate's mandate." ”

In no small way, then Thiboutot may be viewed as a mandate aiding in the enforcement of other mandates or, a "mandate's mandate." Certainly, prior to the decision, it was not always easy for potential litigants to enforce conditions of aid:

> Plaintiffs in these actions frequently encounter[ed] serious "threshhold" difficulties, including the question of whether they [had] a "cause of action" if the underlying grant statute does not provide for such suits. (Such provisions are rare.)[36]

However, these difficulties may now be greatly diminished:

> If the grantee whose actions are challenged is a unit of state or local government Thiboutot may sweep away cause of action obstacles previously facing such plaintiffs.[37]

Ironically, though Thiboutot was fought over a state action, its impact will, in all likelihood, be felt most keenly at the local level. State governments are protected, by the terms of the 11th Amendment, from suits originating in the federal courts seeking retroactive monetary damages.[38] So too, officials at both the state and local levels can, at least, assert their own "good faith" in defense of their actions or inactions. That, of course, leaves only one suable entity, unprotected by either the Constitution or its good faith—the municipality as "person."

Section 1983: The Search for Equilibrium

> Refusal to recklessly extend the reach of a Section 1983 damages action is not a denial of the worth of a plaintiff's interests, as much as it is a recognition that the term "Constitutional tort" should not mean all things to all people; Section 1983 does not require compensation for all deprivations of Constitutional [and statutory] rights through open-ended municipal liability which would treat city treasuries as a fund for mutual insurance.[39]

While the above sentiment was voiced by the attorney for the City of Independence—obviously, a less than impartial critic—is being echoed with increasing frequency throughout the nation. Indeed, it is sentiment borne of genuine and well-founded state and local alarm, as well as a growing "fear in the civil rights community that the too-ready availability of civil rights claims, and the attendant attorneys' fees, will influence the courts' delineation of the civil rights themselves."[40] Yet, the alteration or reinterpretation of a law so vital to the safekeeping of fundamental civil rights and enforcement of the 14th Amendment requires an exceptionally delicate hand—certainly one which would preserve and protect the essential equal rights aspects of the law. While no Constitutional or statutory modification should be undertaken with a meat-axe, the special significance of Section 1983 requires more than extraordinary sensitivity and no little amount of trepidation.

Three basic approaches have been suggested as means to restoring some balance to Section 1983 litigation. Of the three, the most obvious and, at the same time, the most complex, involves judicial reinterpretation of several Section 1983 issues. The second, and most direct approach, involves Congressional amendment. Finally, the third and most novel response to the increase in the scope and frequency of Section 1983 claims involves the creation of state and local legal defense funds.

Judicial Reinterpretation

In deciding future cases, the courts may seek to limit Section 1983 in at least three major ways: by

---

[32] In a companion case decided the same day, the Court held that attorneys fees may be recovered in cases of Constitutionally-based litigation even when the prevailing party prevails through settlement rather than through litigation. [redacted]

[33] 42 U.S.C. Section 1988.

[34] Copeland v. Marshall, No. 77-1351 (D.C. Cir. September 2, 1980) cited in Son et al. The Local Government Liability Explosion and a Plan to Cope With It, pp. 6-7.

[35] The Lawyers Committee for Civil Rights Under Law, "Computation of Public Interest Attorneys Fees: Some Good News via Copeland," Committee Report, No. 39.

[36] George D. Brown, "Grant Litigation After Thiboutot: Some Observations," Paper prepared for the Federal Bar Association's Fourth Annual Conference on Grant Law, Washington, DC, February 20, 1981, p. 2.

[37] Id.

[38] See Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979). In Thiboutot, no 11th Amendment question was present because the action was brought in state court and the decision of Maine's Supreme Judicial Court that Maine must make retroactive payments to the Thiboutots was not contested by the state.

[39] Carlisle, "Owen v. City of Independence," p. 307.

[40] Roy D. Bates, et al., Amendments to the Civil Rights Act of 1871 and the Civil Rights Attorney's Fees Awards Act of 1976: A Report to Congress by Municipal Attorneys Defending Section 1983 Cases, Draft Publication, Washington, DC, National Institute of Municipal Law Officers, 1981, p. 20.

The Judicial Development Of Section 1983: Selected Major Cases

1961	Monroe v. Pape	Expanded the scope of the phrase "under color of state [law]" and ruled that municipalities were not "persons."
1978	Monell v. Department of Social Services	Declared that municipalities may be characterized as "persons" for purposes of Section 1983 litigation.
1980	Owen v. City of Independence	Held that a municipality could not assert the "good faith" of its officials in order to avoid liability.
1980	Maine v. Thiboutot	Asserted that individuals may bring suit under Section 1983 for violations of federal statutory law as well as Constitutional law and upheld application of the Civil Rights Attorney's Fees Award Act to statutory Section 1983 claims.
1981	Pennhurst State School and Hospital v. Halderman Middlesex County Sewerage Authority v. National Sea Clammers Association	Suggested that when federal statutes provide their own exclusive remedies for violations, "they may suffice to demonstrate Congressional intent to preclude the remedy of suits under Section 1983."
1981	Newport v. Fact Concerts, Inc.	Held that municipalities are "immune from punitive damages under Section 1983."

restricting the ability of potential litigants to bring suit under the statute; by reappraising the meaning of "and laws;" and by placing some limits on the extent of liability and damages. In fact, the 1980-81 Supreme Court term resulted in a few limited steps in these directions.

Restricting Access to the Courts. In his dissent to the Thiboutot decision, Justice Powell suggested that a Section 1983 cause of action would not be available where the "governing statute provides an exclusive remedy for violations of the act."[41] In 1981, a different majority—this time including Powell—expressed some sympathy for this means of limiting third party statutory litigation via Section 1983. [redacted]e Supreme Court, though remanding the issue to the Court of Appeals, hinted that the lower court might look favorably upon Powell's suggestion. The law in question, the Developmentally Disabled Assistance and Bill of Rights Act, does indeed provide an exclusive remedy—enjoining the federal government to terminate federal assistance. Under this law, then, third parties would, effectively, be precluded from seeking or receiving damages. Moreover, several weeks later in [redacted]

Reexamining "And Laws." In his Thiboutot opinion, the Court grappled with the meaning of the phrase "and laws" and decided that since Congress had "attached no modifiers," it could not be assumed that Section 1983's "plain language" was "limited to some subset of laws" such as those dealing with equal rights.[45] This interpretation, of course, has been widely challenged. And, indeed, some of the strongest criticism has come from the federal judiciary itself, finding encouragement in echoes of the past.

Thus, in 1939, Justice Harlan Stone sought to limit the application of Section 1983 to deprivations of personal liberty, as opposed to property rights questions.[46] In 1972, the Court rejected that limitation.[47] Recently, however, there has been some support for returning to the Stone definition as a method for restoring balance and meaning to Section 1983.

Judge Henry J. Friendly, Senior Judge of the U.S. Court of Appeals for the Second Circuit, has asserted that a return to the Stone doctrine would come "closer to capturing the spirit of the Civil Rights statute," which, as he notes, was originally drafted to protect the rights of Southern blacks.[48] Moreover, Judge Ruggero J. Aldisert of the U.S. Court of Appeals for the Third Circuit has alleged, with more than a little acrimony, that recent decisions of the Supreme Court have "made the federal court a nickel and dime court. A litigant now has a passport to federal court if he has a 5-dollar property claim and can find some state action."[49]

The Court, in fact, had the opportunity in the 1980-81 term to consider at least a small portion of the Section 1983 property claim issue, but chose not to address that particular question. At issue in Parratt v. Taylor[50] was a Nebraska state prisioner's claim that the negligent loss by prison officials of his $23 hobby kit violated his civil rights and therefore triggered a Section 1983 cause of action. State officials asked the Court to "bar 1983 claims based on simple negligence," to estop 1983 relief when a state remedy is available, and to declare "that certain property is so 'de minimis' in value that it is undeserving of the due process protection afforded by the civil rights statutes."[51]

---

[41] Justice Powell dissenting in 448 U.S. 1 (1980)

[42] 49 LW 4363 (1981)

[43] Slip Opinion, Docket No. 70-1711 (June 25, 1981)

[44] *Ibid.*, p. 17

[45] 448 U.S. 1 (1980)

[46] Hague v. CIO, 307 U.S. 496 (1939)

[47] Lynch v. Household Finance Corp., 405 U.S. 538 (1972)

[48] Henry J. Friendly, Federal Jurisdiction: A General View, New York, NY 1973, p. 91 as quoted in A. E. Dick Howard, I'll See You In Court: The States and the Supreme Court, Washington, DC, National Governors' Assocation Center for Policy Research, 1980, p. 29

[49] Ruggero J. Aldisert, "Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Case Load," 1973 Law and Social Order 557, n. 90 at 569 as quoted in *Ibid*.

The Court, with Justice Marshall dissenting only in part, ruled against the prisoner, holding that he had "not stated a claim for relief under 42 U.S.C. Section 1983," due, on the one hand, to his failure to prove that a deprivation of due process had occurred and, on the other hand, to his failure to seek initial remedy through the state tort claims procedure.[52] Thus, the Court saw no need to address the value of the property under contention.

Limitations on Liability and Damages. Finally, the Court can choose to reconsider the extent of municipal liability and damages awarded. And, while thus far it has not overturned or modified Owen, in its 1980-81 session it saw fit to hold the line.

Indeed, the Court's 6-3 decision in Newport v. Fact Concerts, Inc.,[53] must have evoked an enormous sigh of municipal relief. In that case, musical promoters Fact Concerts felt that their Section 1983 civil rights had been violated when city officials of Newport, RI, refused to allow a performance by rock group Blood, Sweat, and Tears on grounds that the group was likely to "attract a rowdy and undesirable audience to Newport."[54] The district court agreed with the promoters and awarded Fact Concerts $72,000 in compensatory damages. Had it stopped at that award, the decision would have constituted little more than a business-as-usual approach to municipal liability cases. However, Fact Concerts also asked for and was granted punitive damages of $200,000 against the city and an additional $75,000 against city officials—a precedent which, according to some, would "impact on the states' balance sheets [in a way which] may be close to devastating."[55] Despite the city's failure to object to the punitive damages at the trial level, the Supreme Court decided to consider the issue, ruling, on June 26 of this year, that "[a] municipality is immune from punitive damages under Section 1983."[56] Although, according to preliminary estimates, 169 local jurisdictions across the nation remain liable, under pending cases, for approximately $4.2 billion in Section 1983 damages claims, the Court's decision offered considerable relief for 38 localities previously facing over $1 billion in punitive damages.[57]

Congressional Revision

To those who would question his judgment in Thiboutot, Justice Brennan responded:

> Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationships among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained silent in the face of our many pronouncements of the scope of Section 1983.[58]

Indeed, it is to the direct heirs of the authors of Section 1983, that one, logically, would look for relief from its more onerous aspects. Two current companion bills, S.584 and S.585, sponsored by Sen. Orrin Hatch (UT), would seek to do just that by addressing the major issues in Thiboutot and Owen.

S.584 would qualify "and laws" to mean those laws "providing for equal rights of citizens or of all persons within the United States," thus, effectively overruling the Thiboutot decision. S.585, the anti-Owen companion bill, would bar actions against municipalities which have "acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons." Such attempts to Congressionally circumscribe Section 1983 have been supported by Supreme Court Judge Sandra Day O'Connor, commenting recently, "that Congressional action might be taken to limit the use of Section 1983."[59]

Additional measures have been proposed. For example, the National Institute of Municipal Law Officers (NIMLO) suggests that Congress could discourage "the impulse to file frivolous Section 1983 actions" by amending the Civil Rights Attorneys' Fees Award Act of 1976 "to limit the discretionary award of fees to awards against the United States in enforcement of actions under Title VI of the Civil Rights Act of 1964."[60]

State and Local Response

In the past, it has often been difficult for individual municipalities and states to muster the necessary resources and information with which to defend

---

[50] Slip Opinion, Docket No. 79-1734 (May 18, 1981).

[51] "Arguments Before the Court," The United States Law Week (March 24, 1981) 49 LW 3697.

[52] No. 79-1734, op. cit.

[53] Slip Opinion, Docket No. 80-396 (June 26, 1981).

[54] Ibid., p. 2.

[55] Brief Amicus Curiae of the States of Washington, Alabama, Alaska, Connecticut, Hawaii, Indiana, Minnesota, Montana, North Carolina, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, West Virginia, and Wyoming, and National League of Cities and National Association of Counties in Support of Petitioners, City of Newport, et al, in the Supreme Court of the United States, October Term, 1980, The City of Newport, et al v. Facts Concerts, Inc., et al 80-396 p. 2.

[56] No. 80-396 op. cit. p. 11.

[57] NIMLO, Brief Amicus Curiae, op. cit., pp. 21-23.

[58] 448 U.S. 1 (1980).

[59] Judge O'Connor quoted in Neal R. Peirce, "A Voice for the States: O'Conner May Check High Court's Federal Bias," Nation's Cities Weekly, 4, August 10, 1981, p. 7.

[60] Bates, et al, Amendments to the Civil Rights Act of 1871, p. 22. Title VI prohibits discrimination on the grounds of race, color, or national origin in any program or activity receiving federal financial assistance.

> **"... the recent history of Section 1983 brings into conflict two cherished American values: a strong federalism and the constant extension of rights."**

themselves adequately against damage claims. Thus, a final means for restoring balance to Section 1983 litigation, as well as other legal action both initiated by and against states and localities, may rest in the creation of pooled defense funds and/or legal talent, such as the establishment of a joint state-local legal defense organization of the type recently recommended by ACIR.[61]

Other groups and individuals have advocated similar defense strategies. For instance, NIMLO has proposed the creation of a National Municipal Legal Defense Fund. The NIMLO fund would "direct litigation activities to cases of obvious nationwide importance, aid all fund members with information," and carry on a variety of additional activities such as assisting members in strike management.[62] Speaking to the National Governors' Association (NGA), Professor A. E. Dick Howard of the University of Virginia has recommended that the states create a legal advocacy committee following the lines of the NIMLO model.[63] Still others favor joint state-local endeavors. For example, Washington lawyer Stewart A. Baker, arguing that "of all the institutional litigants appearing regularly before the Supreme Court, state and local governments consistently present the weakest legal defenses," urges the creation of a "Federalism Legal Defense and Education Fund" which would develop the type of skills and expertise now available to the federal government through the Solicitor General's Office.[64]

Conclusion

Unlike William Ernest Henley's unsung hero in "Invictus," state and local officials are not masters of their fate. They do not know what clutch of circumstances will bring them before the courts in a 42 U.S.C. 1983 lawsuit as the Supreme Court wrestles over the meaning and application of the rights, privileges, and immunities secured by the Constitution and other laws of the United States. If past history is any guide, there will evolve newly defined rights for individuals with a commensurate loss of traditional prerogatives and immunities for state and local government.[65]

> At little expected cost, the Thiboutot holding offers the promise that all state and local officials will be both held accountable for past deprivations and deterred from committing future errors. These ends will best be served if Thiboutot plaintiffs are able to recover damages. Only then will effective compensations and deterrence take place.[66]

As the two quotations noted above make clear, the recent history of Section 1983 brings into conflict two cherished American values: a strong federalism and the constant extension of rights. Indeed, as one commentator has noted, "the relationship between the themes of federalism and individual rights is one that runs deep in American intellectual and social history."[67] [redacted] An imbalance in favor of "states' rights," as all too much of our history has shown us, can undermine not only the equal rights and privileges of which we are justifiably proud, but the validity of federal principles as well. Thus, any change in the scope of Section 1983—whether judicial or Congressional—must be handled with the type of kid glove approach generally reserved to Constitutional questions. Resolving whatever problems currently exist in the application of Section 1983 requires a delicate policy balance rather than a drastic swing of the pendulum.

Cynthia Cates Colella is an analyst in ACIR's Structures and Functions section.

---

[61] Advisory Commission on Intergovernmental Relations, **The Federal Role in The Federal System: The Dynamics of Growth, Vol. X: An Agenda for American Federalism: Restoring Confidence and Competence**, A-86, Washington, DC: U.S. Government Printing Office, 1981, p. 144.

[62] Wilson, et al., *op. cit.*, pp. 32-34.

[63] Howard, *op. cit.*, pp. 47-52.

[64] Stewart A. Baker, "Why the States Need Better Lawyers," **The Washington Post**, March 1, 1981, p. C2.

[65] Walter S. Groszyk, Jr., and Thomas J. Madden, "Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980s," **Public Administration Review**, 41, March/April 1981, p. 274.

[66] "The Supreme Court, 1979 Term," 94 **Harvard Law Review** 75, 230, November 1980.

[67] "Developments in the Law: Section 1983," **Harvard Law Review** 90 (1977) 1133, 1135 cited in Neil D. McFeeley, "The Supreme Court and the Federal System," **Publius**, Fall 1978, p. 7.

Jack Manning—New York Times

The Willowbrook school: A landmark case at $75 an hour

Can Lawyers Sue for Equal Pay?

When New York cut off Ellen Stenson's Medicaid benefits, three young lawyers from the Legal Aid Society came to her defense. Suing for her and several thousand other clients who had lost their public assistance, the attorneys argued that the state's failure to provide appeal hearings for the Medicaid recipients violated federal rules. But what made the case of Ellen Stenson vs. the faceless bureaucracy notable was not whether New York would pay the Medicaid benefits; rather, it was whether it would pay the attorneys' fees.

Using a 1976 civil-rights law, the lawyers demanded that the state pay their fees. But what fees? Legal Aid is funded by government and charitable contributions, and doesn't charge its clients. The lawyers asked for junior Wall Street rates—up to $105 an hour. The judge agreed and even added a 50 percent bonus. Legal Aid attorneys went home happy, expecting a check for $118,986, money that could be used against other windmills. Instead of paying, New York appealed to the U.S. Supreme Court, where the bureaucratic battle over Medicaid now threatens to change the financing of civil-rights cases across the nation.

Backlash: At stake in the Stenson case is the Civil Rights Attorneys' Fees Awards Act of 1976 that says that judges may award "reasonable" fees to victorious plaintiffs in civil-rights cases. (Suits eligible for fee awards range from traditional school- or housing-bias cases to free-speech or welfare-rights issues.) The lawmakers hoped that the prospect of earning awards would encourage more lawyers to take on these cases. It has: a small number of lawyers around the country have been able to build practices handling civil-rights cases. Also, public-interest groups now rely on fee awards for up to one-fourth of their annual budget.

The successful use of the statute, however, has prompted a backlash, particularly among the state and local governments that have to pay the tab. A June report by the National Association of Attorneys General charged that federal judges have set fees too high and have handed winning law firms exorbitant profits. The report also argues that states are now straining under the burden: Florida expects a bill of $2.6 million for 1983 fees alone; Kansas plans to pay out more to winning lawyers than it does in actual damage awards.

The states are not alone in recognizing the problem. Conservative Sen. Orrin Hatch of Utah has introduced a bill to limit fee awards and will hold hearings on the issue this month. "Nobody's questioning whether they should receive a fee," says Hatch aide Randall Rader. "The question is whether there should be windfalls." Last year some officials in the Reagan administration who view civil-rights lawyers as enemies floated stringent antifee legislation that ultimately got nowhere. Last month Solicitor General Rex Lee entered the Ellen Stenson case, urging the Supreme Court to reverse the fee decision and completely rewrite the rules that permit large awards.

The fees law is a bit of an anomaly. The traditional "American rule" provides that each side—win or lose—pays for its own lawyer. Congress carved exceptions to that rule, however, most notably in antitrust and securities cases by making losers pay the fees of victorious lawyers. By the late 1960s, judges had extended this idea—known as fee-shifting—to some civil-rights issues as well. That trend continued until 1975 when the Supreme Court held that only Congress could authorize a loser-pays policy. The lawmakers responded with the 1976 act, and since then the courts have been trying to figure out how to apply it.

New York and the Justice Department argue that Congress did not intend for groups such as Legal Aid to be paid the same rate as private lawyers, because private firms' billing rates take into account overhead costs and profit margins that public-interest groups do not have. Therefore, they conclude, an award tied to private commercial billing rates carries a built-in windfall. But according to Western New England College law Prof. Arthur Wolf, a staffer for the 1976 bill's sponsor, "Congress is clear—nonprofit groups are not to be treated differently from the private bar."

Hourly Rates: The Supreme Court may settle the matter when it hears the Stenson case in the upcoming term. Until now, most of the federal appeals courts have accepted Wolf's view and regularly approve payments to publicly funded groups at private hourly rates. (Although many lawyers complain that payments, in practice, are often low and delayed.) In June, however, an appeals panel in New York took a different position. Those judges held that the Legal Aid and Civil Liberties Union lawyers who brought a landmark case against the Willowbrook Developmental Center for the retarded were entitled to no more than $75 per hour. Federal Judge Jon Newman said that while it would be unfair to reimburse only the groups' costs, it was also unreasonable to peg fees to the rates of Wall Street firms. (The Willowbrook decision was immediately incorporated into New York's brief in the Stenson case.)

A second issue in Stenson—whether courts may award winning lawyers a bonus—is more emotional. Forty state attorneys general have asked the Supreme Court to halt this practice. The Justice Department suggested that bonuses should be limited to only the most extraordinary test cases but that, even then, they should never be paid to public-interest groups. Again, the retort is that Congress already decided the issue in favor of Legal Aid. According to E. Richard Larson, an American Civil Liberties Union fees expert, the lawmakers said complex civil-rights cases should be compensated as though they were complex antitrust cases—where bonuses are frequently awarded. Also, he says, these "upward adjustments" are needed to encourage both public groups and private lawyers to take on risky, lengthy cases.

Reform: In this era of highly inflated legal fees, public-interest lawyers may be the first to find their work less rewarding. The move against civil-rights groups, explains Marshall Breger, a fellow at the conservative Heritage Foundation, is only "the beginning of an effort to come to grips with an uncontrollable and unstructured fee-setting process." Once again, then, the poor may feel the special benefits of another reform.

ARIC PRESS with PEGGY CLAUSEN in New York and
NIKKI FINKE GREENBERG in Washington

STATEMENT OF THE ALLIANCE FOR JUSTICE

The following testimony is submitted on behalf of the Alliance for Justice and its members on S. 2802, the "Legal Fees Equity Act." We appreciate the opportunity to offer our analysis of the proposed amendments in order to assist the Constitution Subcommittee in its consideration of this bill.

The Alliance for Justice is a national association of public interest law organizations. Its members[1] provide legal representation to a wide variety of clients, including Black and Native Americans, poor persons, consumers, women, children, and persons institutionalized in mental health facilities. Many of the clients now served by these public interest attorneys are members of groups that have traditionally lacked the resources to obtain representation to vindicate their legal rights. On behalf of these clients, members of the Alliance have been litigating a number of important cases, safeguarding constitutional and statutory rights and in some instances significantly advancing the law.

---

[1] Members of the Alliance for Justice include: Business and Professional People for the Public Interest, the Center for Law and Social Policy, the Center for Law in the Public Interest, the Center for National Policy Review, the Center for Science in the Public Interest, Consumers Union, the Education Law Center, the Employment Law Center, the Environmental Defense Fund, Equal Rights Advocates, the Food Research and Action Center, Harmon & Weiss, the Institute for Public Representation, the Juvenile Law Center, the Mental Health Law Project, the NOW Legal Defense and Education Fund, the National Wildlife Federation, the National Women's Law Center, the Native American Rights Fund, the Natural Resources Defense Council, New York Lawyers for the Public Interest, Public Advocates, Inc., the Sierra Club Legal Defense Fund, the Women's Law Project, and the Women's Legal Defense Fund.

Alliance members are funded in various ways, including membership dues, foundation grants, charitable donations, and, for a small number of the Alliance organizations, some public monies. When a public interest organization that is a member of the Alliance receives an award of attorney's fees pursuant to Section 1988 or other fee-shifting statute, the award monies are channelled directly into continuing, improving, and if possible increasing, the legal representation the organization offers. All the law firms in the Alliance have received and continue to receive many more requests for legal assistance than they have the resources to provide.

If the provisions of the proposed bill are enacted, fee awards to counsel for all plaintiffs in civil rights, environmental or other cases covered by a fee-shifting provision will be drastically reduced. Fees to nonprofit organizations such as Alliance members will be even further reduced. This result will decrease the availability of counsel for the type of litigation such awards were intended to make possible: those cases which generally do not "carry their weight" in the marketplace because the monetary damages at stake are small, but which nonetheless present issues of great public importance.

Before an analysis of the bill is presented, three important points must be made: First, this bill is not merely a codification of existing law or simply a cap on fees: it is a total repudiation of prior congressional policy as it pertains to the enforcement of civil, environmental and other federal rights as well as most Supreme Court decisions on these issues. As the following analysis shows, the provisions would severely affect fee-shifting statutes traditionally litigated under by public interest firms while having virtually no impact on antitrust and securities statutes. It places stringent limits on the amount which can be recovered by plaintiffs seeking to vindicate their rights, but allows federal, state and city governments to pay any amount to outside counsel hired to defend such lawsuits.

Second, the proponents have failed to demonstrate a need for this legislation. The Administration's Analysis (hereinafter "Analysis") and Report prepared by the National Association of Attorneys General, "The Civil Rights Attorneys Fees Awards Act of 1976," (hereinafter "NAAG Report") provide analyses in support of this legislation. Both contain inaccurate description of current law and effect of the provisions of the bill. Neither provides any aggregate data demonstrating need for corrective legislation.

As the Department of Justice testimony shows, fee awards have not been excessive in the past. Statement of Carol E. Dinkins, Deputy Attorney General, Concerning S. 2802, The Legal Fees Equity Act, Sept. 11, 1984, Table C. In fact, the Department's own statistics, which cover the past eleven years in the U.S. District Court for the District of Columbia, show that past fee awards have been moderate in the overwhelming majority of cases. Hourly rates have generally been less than $75.00; they have slowly increased over the years and are now exceeding $75.00 per hour. The Justice Department data shows clearly that the anecdotal "horror stories" provided by the National Association of Attorneys General are both extraordinary and the only "evidence" which can be proffered in support of this bill.[2]

---

[2] Table C appended to the Department of Justice testimony is a list of fee awards in the District of Columbia, including several antitrust actions, during the years 1973 to 1984. The Government's *own figures* show a very predictable pattern: that fees have risen, very slowly, by year. Excluding $5 and $10 per our awards to *pro se* litigants, the following chart shows how slowly rates have advanced and how small they actually are. It also shows, however, that rates have now reached both a median and an average which is higher than that proposed in this bill.

Year	Average Fee Award	Median Fee Award
1976	$49.82	$50.00
1977	55.79	55.58
1978	67.91	60.00
1979	64.00	62.50
1980	66.25	75.00
1981	70.54	67.50
1982	76.22	75.00
1983	86.98	75.00
1984	96.05	85.00

Chart D, a list of fee awards made against state and local governmental entities in the years 1977 to 1983, reveals the same slow upward trend that Chart C reveals. Chart D Shows:

Year	Average Fee Award	Median Fee Award
1977	$49.00	$47.50
1978	43.75	45.00
1979	60.80	50.00
1980	61.95	50.00
1981	70.83	75.00
1982	79.23	75.00
1983 (one case)	67.50	67.50

[footnote continued]

Third, the full effect of the bill is not known even by its proponents. There are over one hundred fee-shifting statutes covered by this legislation. Exactly how many statutes are affected is not clear. Ms. Dinkins' testimony estimates there are 129 fee-shifting statutes. *Id.* at 1. However, on July 16, 1984, the Solicitor General filed a brief in the United States Supreme Court asserting the existence of 141 such statutes. *Marek v. Chesny*, No. 83-1437, Brief for the United States as Amicus Curiae, Appendix 1a. Further, each fee-shifting statute incorporates a particular congressional policy and standard of recovery which will be changed by this bill. The uncertainty of application of this bill because of the lack of inquiry into all of its effects will only create many more questions and engender more litigation regarding attorneys' fees.

2(continued)

(Note: These figures exclude a case which was reversed, *Selzer v. Berkowitz*, 477 F. Supp. 686 (E.D.N.Y. 1979), *rev'd sub nom. Selzer v. Fleischer*, 629 F.2d 809 (2d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981), an award to a paralegal, *Alexander v. Hill*, 553 F. Supp. 1263 (W.D.N.C. 1983), and cases listed twice -- once including multipliers and once without, *see*, *e.g.*, *Stenson v. Blum*, listed as No. 7 in the $75 to $95 category at $95, and as No. 6 in the $100 and over category at $142.50.

SECTION 2: THE FINDINGS AND STATED PURPOSE OF THE BILL

The Administration asserts that legislation is needed to cure what it claims to be an absence of standards in the application of fee-shifting provisions. However, most disputes over the proper amount of fee awards are factual, not legal, in nature and therefore require judicial consideration not eliminated or resolved by this bill. The need for a court determination as to how many hours are properly compensable or what constitutes a reasonable fee for a particular lawyer or case will not be eliminated by this legislation. The $75.00 cap is a ceiling, not a guaranteed figure. Each case will still require judicial resolution of the issues generally challenged by government defendants. In addition, inserting new definitions and changing standards which courts have developed and adopted over the years will only create confusion and protracted litigation, not eliminate it.

Further, there is no absence of standards provided by the Fees Act. The recent Supreme Court decision in Blum v. Stenson, 104 S. Ct. 1541 (1984), is an example of the clarity of Congress' intent as embodied in the Act: the Court unanimously agreed that fees should be determined by prevailing market rate, and that nonprofit as well as private firms are entitled to such fees. The Court made clear that in certain specified instances an upward adjustment of an hourly rate is properly included in a reasonable fee. Thus, varying rates for different attorneys, firms, levels of expertise, or geographic area demonstrates that the Act is properly and fairly, not inconsistently, being interpreted. (See Comments of E. Richard Larson on behalf of the American Civil Liberties Union, on S. 2802, the "Legal Fees Equity Act," September 18, 1984, at 1-13, for a detailed listing of Supreme Court decisions applying the 1976 Act pursuant to extensive legislative history.)

The Administration also seeks to tie together fees to Criminal Justice Act attorneys and compensation under fee-shifting statutes. While the Alliance does not dispute the need to raise fees to CJA attorneys and wholeheartedly supports such a measure, treating these concerns in a similar fashion demonstrates a lack of understanding of the important distinctions between Congress' intent to provide constitutionally mandated criminal defense counsel and Congress' affirmative design to spur the private enforcement of Constitutional and federal rights through fee-shifting. The Constitution requires that criminal defendants be provided with representation in many instances. On the other hand, the protection of constitutional and statutory rights through civil actions depends on the willingness of the private bar and the ability of the nonprofit bar to accept such cases. The provisions of this bill will drastically decrease awards in many instances, making it more difficult to secure competent counsel. Thus, comparison to CJA rates makes no sense in effectuating the intent of Congress in enacting fee-shifting provisions.

SECTION 3: DEFINITION OF ATTORNEYS' FEES

Section 3 of the bill defines various terms used throughout its provisions and in doing so changes current law in some instances.[3] One of the most serious changes is its definition of attorneys' fees as being solely attributable to attorneys. This provision overrules prior case law holding law student and paralegal services to be compensable. See Davis v. County of Los Angeles, 8 E.P.E. §9444 (C.D.Cal. 1974), cited with approval in S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), accompanying the Civil Rights Attorney's Fees Awards Act of 1976; Jordan v. United States Department of Justice, 691 F.2d 514 (D.C. Cir. 1982) (law students' services compensable under FOIA). Many law firms use the services of law students and paralegals, and bill separately for those services. However, under this legislation a firm will have to absorb this cost of litigation. Further, it may actually be counterproductive: lawyers will be encouraged to complete tasks properly assignable to summer associates or paralegals.

---

[3] The definition of "attorneys' fees" is discussed in this section. For purposes of clarity, discussion of the definitions of "prevailed on the merits" and "decision on the merits," which also present substantial problems, will be included in our analysis of the provisions in which such terms appear.

SECTION 4: SCOPE OF APPLICATION OF THE BILL ELIMINATING ALL COMMON LAW EXCEPTIONS TO THE AMERICAN RULE

Section 4(b) provides that no award of attorneys' fees shall be made against government defendants except as expressly authorized by statute. Therefore, this bill eliminates all common law exceptions to the American Rule that each party must bear the expense for its own fees. Three such exceptions were discussed by the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975): a court may (1) enforce its own orders by assessing fees for the willful violation of a court order, (2) award fees against a losing party that has acted in bad faith, and (3) award fees in commercial litigation to plaintiffs who have recovered a "common fund," usually on behalf of a class. Id. at 258-259.

In addition, this provision conflicts with the Federal Rules of Civil Procedure, which are not statutes but rules promulgated by the Court, allowing judges to award fees for delay or abuse. See Federal Rules of Civil Procedure 7, 11, 16(f), 26(g), 37 and 56(g). These rules promote efficient use of judicial resources and punish bad faith attempts to undermine the litigation process. This bill would supercede such rules and deny courts the means to control bad faith conduct.

SECTION 5(1): AWARDS OF FEES TO PREVAILING PARTIES

Under current law, a plaintiff must prevail on the merits of a claim in order to receive attorneys fees under a fee-shifting statute. This requirement appears simply to be restated in subsection (1) of Section 5. However, because of the bill's definition of "prevailed on the merits" in Section 3(9), the effect of subsection 1 is to reverse the recent Supreme Court decision of Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

In Hensley, which involved an issue under the 1976 Fees Act, the Supreme Court reaffirmed that "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Id. at 1939 (emphasis added). Under the proposed Section 3(9), to prevail on the merits a party must suceed on significant issues in the controversy. Therefore, under current law, a party which has succeeded on one issue but has failed on several others may be awarded attorneys' fees for the issue on which it has prevailed. See Hensley, at 1938-39. Under the bill's current standard, the party who has succeeded on one issue but failed on several others may be found not to have prevailed on the merits and may be ineligible to receive attorneys' fees. Neither the bill nor the accompanying Analysis (p. 10) offer any explanation for this important difference. The new standard contravenes the purpose of fee-shifting statutes by making a plaintiff who has succeeded in vindicating an important right ineligible for fees simply because on other issues in the litigation the court was not persuaded by the arguments.[4]

In addition to changing the Hensley standard, subsection (1) creates an additional standard to be met before the prevailing party is eligible for attorneys' fees: the party must achieve the requisite recovery. While Hensley provides for fees if plaintiff achieves "some of the benefit ... sought," 103 S. Ct. at 1939, this bill requires the recovery of "significant" relief, apparently a higher degree of success.

Frequently, the relief obtained in civil rights and other public interest litigation is equitable in nature. This type of relief is typically difficult to quantitatively evaluate, and therefore it will be extremely problematic for a court to determine whether the requisite degree of success has been met. This subsection will discourage litigation under fee-shifting statutes, especially that involving first impression claims, where equitable relief, and not monetary damages, is the primary relief sought.

---

[4] The Administration Analysis (p. 10) claims that Hensley is subject to misinterpretation. An example given by the Administration Analysis to illustrate the misapplication of Hensley is Laffey v. Northwest Airlines, Inc., No. 2111-70 (D.D.C. July 29, 1983). Contrary to their assertion, the plaintiffs in Laffey were successful on all significant issues and therefore correctly found to be prevailing parties. If Laffey is considered to be a case in which the plaintiffs should not have been construed to be prevailing plaintiffs, then it is difficult to imagine a plaintiff who would be awarded fees under this provision.

Finally, this subsection will be misperceived if it is viewed as simply a restatement of Hensley. See Analysis, p. 10. It provides no clarification for an already accepted standard; in fact, by claiming to clarify Hensley when it really does not, subsection (1) only serves to confuse the issue, possibly forcing additional litigation of the same issues that Hensley resolved.

SECTION 5(2): AWARDS OF FEES FOR NECESSARY WORK PERFORMED IN CONNECTION WITH THE ISSUES

Subsection (2) requires the party eligible to receive attorneys' fees to establish that the award sought resulted from necessary work performed in connection with issues upon which the party prevailed. This provision will confuse the clear standard set in Hensley, 103 S. Ct. at 1943, which states:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. Where a plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Id. at 194.

The Analysis (p. 14) states that this provision "is not intended to preclude awards of attorneys' fees and related expenses where a party's pleadings contain meritorious alternative grounds for relief, based on the same facts as those on which the party prevailed, on which a court or administrative officer did not rule because the party prevailed on other grounds." This standard is significantly narrower than that set out in Hensley because the court must make an additional determination as to the merits of alternative claims before granting a fee award. This change is also problematic in its application because it is difficult to foresee how a court will avoid ruling on an alternative ground for relief, yet determine that this alternative ground is "meritorious." See Comments of Henry Cohen, "The Legal Fees Equity Act," (Congressional Research Service, The Library of Congress, June 13, 1984), p. 12. Subsection 2 is also inefficient because it forces the court to consider the merits of issues in a case that have no bearing on the ultimate judgment. This will create unnecessary work and delay in litigation.

Subsection (2) runs contrary to Rule 1.3 of the ABA Rules of Professional Conduct requiring zealous representation. Even if lawyers accept cases involving fee-shifting provisions, they will hesitate to pursue and incur litigation expenses on novel issues which the court might later determine to be non-meritorious. This provision is also at odds with Rule 12 of the Federal Rules of Civil Procedure, which encourages counsel to make complete pleadings on all claims.

SECTION 5(5): AWARDS OF FEES WHERE SERVICES ARE NOT EXCESSIVE, REDUNDANT, OR OTHERWISE UNNECESSARY

Subsection (5) requires the prevailing party to establish that the fees sought are for services that are not excessive, redundant, or otherwise unnecessary. The words "excessive" and "redundant" are themselves unnecessary as such fees are not available under current law. The phrase "otherwise unnecessary" allows courts total discretion in denying fees. This is contrary to the standard established in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), which was cited with approval in the legislative history of Section 1988. In Newman, the Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[5]

Subsection (5) is likely to engender further litigation as to the meaning of "otherwise unnecessary." This provision broadens the scope of a court's judicial discretion by allowing fee awards to be eliminated not only where the judge believes they are unjust, but where the court simply does not like the services performed. For example, a court applying this standard could decide that because a public interest law firm has other income sources, a fee recovery is not "necessary." Even general practice law firms may be denied attorneys' fees where the court thinks they are unnecessary.

---

[5] The NAAG Report argues that Newman has been misinterpreted by the courts to the point of making "the award of fees to a prevailing party mandatory." Numerous decisions applying the Newman standard are cited in the Report, suggesting that there are no "special circumstances" where rendering a fee award would be unjust. However, fees were justly awarded in those cases. (See Appendix ___).

SECTION 6(a): CEILING ON AMOUNT OF ATTORNEYS' FEES AWARDS AND PROHIBITION ON UPWARD ADJUSTMENTS

Section 6(a) purports to set "reasonable" limits on the amount of attorneys' fees that can be recovered. The provision prohibits awards of attorneys' fees against the government in excess of $75 per hour, and also bars the use of bonuses and multipliers.

To impose a $75 per hour ceiling without allowing an upward adjustment under any circumstances will deter the private enforcement of constitutional and statutory rights and policies. Because many experienced and skilled attorneys charge more than $75 per hour, the number of attorneys willing to take public interest litigation will be drastically reduced. Also, by setting an arbitrarily low ceiling, governmental defendants will have less incentive to refrain from unlawful conduct or to settle cases. The ultimate result will be that the costs to defendants in violating the law will be far less.

The proponents of this bill claim that the $75.00 per hour cap included in the Equal Access to Justice Act is evidence that such a cap is appropriate for all fee-shifting statutes. (See

Sec. 2(a)(4)) However, under the EAJA, fees are not intended to be routinely granted. The purpose of the EAJA is primarily to protect certain individuals from unreasonable government conduct, not attract counsel to the types of cases covered by fee-shifting statutes. Therefore, the comparison of the EAJA cap with all other fee-shifting provisions ignores the differing intent and purpose of each act.

In contrast to this provision, state and local governments currently can retain outside counsel at the going rate. A recent report by the Auditor General of California, "Attorney Fees Paid or Collected by State & Local Agencies, 1980-1982," indicates that California state agencies have paid outside counsel at rates as high as $275 per hour. However, under this legislation, plaintiffs who have had their civil rights violated will only be able to hire those attorneys who are willing to accept at a minimum a potential fee of $75 per hour.

In fact, Chart B of Ms. Dinkins' testimony shows the total amount of fees[6] paid by the Government Accounting Office in 1981 -- 1983 (three years) is $3,782.752.70 -- an average of $1,260,917.50 per year. This is surprising considering the fact that President Reagan's Budget Message in 1982 -- which first contained the seeds of the "Legal Fees Equity Act" -- estimated that court awarded legal fees had cost the goverenment $20 million in 1981 alone, and this was the main reason the legislation was suggested. See also McTeer Testimony, September 11, 1984, footnote 11, showing that the cost of outside counsel hired by the FDIC, in 1983 alone, was $17.7 million. Thus, one federal agency spent about 14 times as much on outside counsel in one year as the average annual expenditure in court-awarded fees which this chart shows. The same footnote says the Federal Home Loan Bank Board paid outside counsel $6.4 million in 1983, so that this agency spent only five times as much as the average annual expenditure in court-awarded fees which this chart shows. The City of Richmond, Virginia, paid its outside counsel $1 million in one antitrust case. The Washington Post, Monday, September 10, 1984, p. A-1. Thus, Richmond Spent, in one case, nearly what the United States paid in an average year during the years 1981-1983.

---

[6] Some of the cases listed include taxable costs as part of a fee settlement, and other cases deal with contractual indemnification, not attorney fee statutes (and so won't be affected by this bill), so the actual attorney fee totals are somewhat less.

Furthermore, government counsel frequently seek and recover fee awards based on market rates when prosecuting violations of federal law. As our accompanying letter indicates, a brief amici curiae was filed by 43 states in support of market rates to state attorneys general in 1980. See Illinois v. Sangamo Construction Company, 657 F.2d 855 (7th Cir. 1981). To limit private attorneys to a recovery of $75 per hour, while allowing a government attorney to recover market rates, is unjust. Its effect can only be to demean the importance of civil rights, environmental and consumer litigation.

No justification is offered by the bill's proponents for eliminating the availability of upward adjustments in appropriate cases. In Blum v. Stenson, 104 S. Ct. at 1548, however, the Court made clear that there are limited and clearly delineated circumstances in which multipliers are warranted where the quality of service is high compared to the hourly rate charged, where the success achieved is exceptional, where a multiplier provides compensation for the amount of risk undertaken on a controversial issue and where these attorneys often have to endure lengthy delays before their fee awards are paid.[7]

---

[7] Chart A of Ms. Dinkins' testimony reports nine cases in which multipliers are purported to have been awarded against the United States. One of these awards was reversed, North Slope Borough v. Andrus, 515 F. Supp. 961 (D.D.C. 1981), rev'd sub nom. Village of Kaktovik v. Watt, 689 F.2d 222 (1982), and another was not an assessment against the United States, Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 1190 (1983). The seven valid figures resulted in an average multiplier of 39.5% (and a median of 11 percent).

Chart A also reports 11 cases in which multipliers were awarded against State defendants. In one of these, Stenson v. Blum, 512 F. Supp. 680 (S.D.N.Y.), aff'd mem., 671 F.2d 493 (2d Cir. 1981), rev'd in part, 104 S. Ct. 1541 (1984), the application of a multiplier was reversed. The ten valid figures resulted in an average multiplier of 40.34 percent, and a median of 22.5 percent.

Chart A does not reveal how the cases listed were chosen. It does not include cases in which downward multipliers have been applied, and so does not show the true percentage effect of multipliers under the present system. Nor, of course, does it include all the cases in which multipliers have been awarded against governmental entities, so it is unclear whether these cases are in fact a representative sample.

Ultimately, the restrictions of Section 6(a) will cause fewer attorneys to accept a role as "private attorneys general," because the prospect of adequate remuneration for their services will become so uncertain.

SECTION 6(b): SUBJECTIVE STANDARDS FOR RESTRICTING THE AMOUNT OF ATTORNEYS' FEES

Section 6(b) attempts to set guidelines for the court or administrative officer to follow when considering a reduction in attorneys' fees. The provision lists six possible bases for a reduction or denial in the amount of attorneys' fees otherwise allowable.

As previously stated, the limits on attorneys' fees recognized by the Court in Newman, 390 U.S. at 400, and in Hensley, 103 S. Ct. at 1938-39, already provide adequate guidance for the courts. Indeed, the effect of the legislative would be to create a separate body of law involving specific, new, and unnecessary exceptions to a recovery of fees, a burdensome undertaking where adequate checks are already in place.

Subsection (1), which allows a court to reduce or deny fees if the prevailing party engaged in conduct that unreasonably protracted the final resolution of the controversy, amounts to no more than a useless restatement of Section 5(b). Assuming that the party eligible for recovery has established that attorneys' fees sought are not excessive, there is no need for the court to consider the subordinate question of whether the party engaged in delay tactics. The obvious similarities of the two provisions will only create confusion in their application. Furthermore, there are already federal statutory provisions with additional sanctions in existence to prevent unreasonably lengthy litigation. *See* 28 U.S.C. §1927, as amended.

Subsection (2), which allows a reduction in fees if there is no bona fide attorney-client relationship with an identified client, is confusing. It is not clear how a situation where there is no attorney-client relationship could arise under this bill and no definition of the term is offered in the Administration's Analysis.

Subsection (3), which calls for a reduction if the fees unreasonably exceed the hourly salary of the attorney, creates a standard which will result in fee award discrimination between public interest attorneys and private practitioners. For example, under this standard in a typical civil rights lawsuit, a public interest attorney with an annual salary of $30,000, and hence earning $15 per hour, will only be able to recover this hourly amount in fee awards. In contrast, a private attorney of commensurate skill and experience who sets (or whose firm sets) his or her billing rate at $60 per hour will recover a fee of $60 per hour for performing the same work and achieving the same amount of success.

Congress recognized the basic unfairness that such a provision would create. The legislative history of the Fees Act, for instance, provides that fee awards for all attorneys would be awarded based on prevailing market rates. See Blum v. Stenson, 104 S. Ct. at 1547. Most courts consistently recognize that public interest attorneys should not receive lower fees than similarly experienced attorneys in private practice simply because of the public interest nature of their work or because of their lower salaries.[8] In addition, applying market rates will encourage and reward legal services organizations expending their limited resources on litigation aimed at enforcing civil rights and other public interest stautes. See Dennis, 611 F.2d at 1306.[9]

---

[8] Courts have held that to properly compute legal fees, an inquiry should be made into the value of the legal representation. See, e.g., Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 198). For public interest attorneys who usually do not have regular billing rates, courts look to the billing rates of private counsel "of comparable experience in cases of comparable complexity" to determine the value of their services. Dennis v. Chang, 611 F.2d at 1302, 1309; see also Northcross v. Board of Education of Memphis, 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); R. Larson, Federal Court Awards of Attorneys' Fees, 197-209 (1980).

[9] It is important to point out that the concept of "market rate" at which fees under fee-shifting statutes are computed is not what an attorney in private practice would charge for a particular case. It is, instead, an artificial construct: the typical rate, charged by a typical lawyer with the experience of the fee petitioner, for a typical case where fees are guaranteed and received monthly. Where the case is not typical, or the lawyer is not typical, or the case is not typical, and particularly where fees are contingent and received only at the end of the case, the artificial construct of "market rate" does not yield a reasonable fee.

> The bonus or multiplier that enhances a lodestar is not a figure that increases a reasonable fee, but a figure that brings an unreasonably low fee up to a

(Footnote continued)

This paragraph contains other defects. It will create an unjustified windfall for defendants, and reduce settlement and compliance incentives. A defendant liable for attorney's fees because a prevailing plaintiff obtains nonprofit legal representation with an accompanying low hourly salary will enjoy a financial windfall compared to another defendant required to pay a private attorney's larger hourly compensation in a comparable cse. See Hensley v. Eckerhart, 103 S. Ct. at 1938; Gunther v. Iowa State Reformatory, 466 F. Supp. 367 (N.D. Iowa 1979). In Oldham v. Ehrlich, 617 F.2d 163, 168-69 (8th cir. 1980), the court said that a defendant sued by a plaintiff retaining non-profit legal services should not be benefitted by the fortuity that the plaintiff did not seek private counsel.

Adopting the hourly salary provision will diminish the effectiveness of fee awards to encourage potential defendants to comply with civil rights statutes. See Dennis, 611 F.2d at 1306. Where one "focus of the 1976 Fees Act is ... on deterring

---

9(continued)

> level where it more nearly represents the true market value of an attorney's work. The negative multiplier, or percentage reduction of the lodestar, brings an unreasonable fee down to a reasonable one, when the lodestar itself makes allowances for elements of quality that were not present in the individual law suit.

M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶16.04 at 16-78.4 - 16-79 (1983) (footnotes omitted).

misconduct by imposing a monetary burden upon the wrongdoer, a legal aid organization merits an attorney's fee fully as much as does the private attorney." Oldham v. Ehrlich, 617 F.2d at 169. Consequently, this provision will lessen the incentive for defendants to comply with the law.

Were the dual standard for computing fee awards adopted, defendants will also have a reduced incentive to settle claims. A defendant who does not have to pay the full market value of the nonprofit legal services will be more reluctant to settle the claim than would be the case if a high-priced private firm had undertaken plaintiff's representation. Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc); see also Dennis v. Chang, 611 F.2d at 1309. Inversely, a plaintiff who is represented by nonprofit legal services will be unable to exert sufficient pressure on the defendant to settle an obviously justified claim.

Subsection (4), which calls for a reduction or denial in fees if the time and legal services provided were excessive with regard to the controversy, is duplicative and unnecessary since this standard is already consistently applied by the courts. See Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978). Underlying this standard is enormous potential harm for civil rights, environmental and consumer litigation: public interest litigators will be discouraged from pursuing additional meritorious issues which the court may consider excessive.

Subsection (5), which allows a reduction or denial if the fees unreasonably exceed the monetary result or injunctive relief achieved in the proceeding, much like sec. 5(1), attempts to link the fee award directly to the relief provided. Not only will this provision overturn Newman, it will erode the purpose of attorney fee provisions to encourage private enforcement of civil rights and other public interest laws. If successful plaintiffs were routinely forced to bear their own attorneys' fees or to have them reduced because the equitable relief obtained is viewed as minimal, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts, especially where monetary relief is not allowed (Title II of the Civil Rights Act of 1964). Record of the N.Y. Assoc. of Bar (p. 303-04). See also Hensley v. Eckerhart, 103 S. Ct. at 1948-49 (J. Brennan, dissenting); McCann v. Coughlin, 698 F.2d 112, 129 (2d Cir. 1983). In addition, the act of awarding the requested fee would act as a deterrent for others to cause constitutional deprivations. See also Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

The NAAG Report supports this provision and cites numerous cases purporting to show the award of excessive attorneys' fees; however, NAAG misinterprets many of these decisions which actually provide clear proof that the courts do award reasonable attorneys' fees. For example, the Report refers to Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982), as an illustration of an unfair award. In Rivera, $243,000 in attorneys' fees were awarded, and plaintiffs also obtained a jury verdict of $33,000. The Report apparently draws the conclusion from these facts alone that the fee is excessive because it is substantially larger than the verdict award.

This mathematical determination of the worth of a particular case misses completely the importance of the case: in Rivera, plaintiffs were Mexican-Americans whose home was broken into by police using tear gas, and who were illegally arrested with unnecessary physical force. The importance of vindicating such rights cannot be measured in monetary terms alone, and it is precisely for this reason that Congress enacted fee-shifting statutes.

Similarly, this view was reflected in Pugh v. Rainwater, 465 F. Supp. 41 (S.D. Fla. 1979). There, the plaintiff successfully challenged both the state's practice of holding persons in custody solely upon a probable cause determination made by state attorneys and the constitutionality of the use of money bail as a condition of release for indigent defendants. Despite the fact that no monetary relief was given, the court granted a fee award of $90-100 per hour because:

> Without doubt, the time claimed represents a reasonable expenditure of effort for a case of this magnitude.... [This case] was a novel and difficult case from a substantive and procedural viewpoint.... This is perhaps the most significant case to come out of the Southern District Court in the last decade.

Id. at 44-45.

Subsection (6), which allows a reduction or denial of fees if it would otherwise be appropriate, will confer unlimited judicial discretion to reduce or deny fees. This provision, however, contrasts sharply with the bill's ostensible intent to standardize fee awards. The actual intent of the bill is made clear from its many provisions allowing total judicial discretion to *reduce* fee awards, while restricting judicial discretion to award fees. It is inconsistent for the bill's purposes to criticize "unwise and broad judicial discretion," on the one hand, and on the other advocate such vast judicial discretion to deny or reduce fees.

SECTION 6(c): REDUCTION OF MONETARY AWARD BY AMOUNT OF ATTORNEYS' FEES AUTHORIZED

Subsection (c) reduces the monetary judgment awarded by the amount of attorneys' fees otherwise authorized up to 25 percent of the judgment.

This provision contains numerous problems. For example, it is contrary to the goal of the 1976 Fees Act and other fee-shifting statutes to provide full redress for violations of the law. It is patently unfair for a client to have to forego a portion of the relief s/he has obtained. The provision fails to describe how or whether the client pays the attorney out of the monetary recovery. For example, if the attorney and client expect that 25 percent of attorneys' fees will be taken out of the monetary judgment, the client may request and expect an unreasonably high award to compensate for the fee deduction. Further, in preparing a fee application once a judgment has been rendered, attorneys will be in conflict over recovering their total cost and reducing their clients' recovery.

The purported rationale of this provision is for the prevailing party to pay some of his or her legal expenses from the monetary award. Ironically, however some cases will be that the losing party may avoid altogether having to pay an attorney fee award. All parties will therefore be in the same position as if there were no fee-shifting statute. In addition, the provision will cause the anomalous result that arguably the most culpable defendants, those liable for the largest damages, will be the least likely to pay attorneys' fees.

Finally, it is nonsensical that a plaintiff suing the government under a fee-shifting provision will have his or her monetary relief reduced by 25 percent for attorney's fees, but a plaintiff suing a private party under the same provision will be able to keep 100 percent of the monetary relief. This bill will simply make it less costly for the government to violate the law. Finally, the undue hardship exception provides little relief from the virtual automatic operation of the 25 percent reduction: Because the subsection is new and the judge lacks clarification, this exception to the standard may be applied irregularly and unfairly.

SECTION 7(a): TIMELY APPLICATION AND FILING REQUIREMENTS FOR FEE AWARD

Section 7(a) creates a thirty-day deadline for filing a fee request. This section makes a well-deserved fee award more difficult to recover, and places an onerous time limitation in the path of recovery of a fee.

For example, thirty days is frequently inadequate to meet the extensive filing requirements set by some courts. Where the attorney seeking fees acts in good faith and for good cause, but cannot reasonably meet the filing deadline, the provision should allow for an extension of the deadline.

SECTION 7(b): PROCEDURAL REQUIREMENTS FOR APPLICATION OF FEE AWARD

This section prohibits any consideration of fee awards until after a decision on the merits by the court. The major problem with this provision is its vagueness. Part (b) appears to contradict *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980), where the Supreme Court held that under the 1976 Fees Act, an attorney can recover intermediate relief where a party has clearly established some entitled to relief but the court has not rendered a final judgment. In effect, the provision will preclude interim awards where some liability is established, but where the final judgment has not been rendered. The Analysis, however, seems to agree with the idea that some interim awards are appropriate when discussing Section 5(1), but offers no explanation for the bill's apparent denial of interim awards under part 7(b). *See*

Administration Analysis (p. 12). This uncertainty about interim awards may well discourage private counsel from accepting cases requiring lengthy litigation because there will be no opportunity for recovery of any fee during the litigation even if liability has been established.

SECTION 8(1): DENIAL OF FEES WHERE CLAIM IS MOOT AND CAUSATION IS NOT SHOWN

This section would deny fee recovery where the government demonstrates to the court that the claim is moot due to a change in government policy and the claim was not a material factor in the change of policy.

The showing that the plaintiff's lawsuit be a "material factor" in changing government policy and thereby mooting the claims at issue need not be written into the statute. The Alliance opposes this test because it is unworkably vague and also more burdensome for plaintiffs than the tests that are currently in wide use and that require plaintiffs to show their role as "catalyst" for changes. Moreover, this standard places an impossibly hard burden of proof on a plaintiff who has to prove that the lawsuit was a "material factor." Courts never look at the motives of legislatures, nor is it even feasible to make inquiry into the subjective views of a collegial body. The motives of an administrative body may be equally opaque. Thus in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), where a full evidentiary hearing on causation with respect to both law and fact was required, the court noted: "... we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit." The court added: "This is particularly true where evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff."

The proposed amendment introduces another element of unfairness with respect to issues where there may be a "critical mass" of lawsuits that creates pressure for change. The requirement that each and every plaintiff demonstrate that his or her case was "a material factor" could be unsurmountable.

SECTION 8(2): SETTLEMENT DEFENSE WHERE SETTLEMENT OFFER EXCEEDS ULTIMATE RELIEF

Section 8(2) prohibits a fee award for services performed subsequent to the time a written offer of settlement is made to a party if the offer is not reasonably refused and the final relief finally obtained is not more favorable to the party than the offer of settlement. This provision purports to provide an incentive for governments to make reasonable settlement offers to plaintiffs and for plaintiffs to seriously consider these offers. _See_ Analysis (p. 26).

Section (2), however, would severely discourage the bringing of meritorious public interest litigation when private attorneys are faced with the "prospect of sacrificing all claims to attorneys fees for legal work at the trial if they win, merely because on the eve of the trial they turned down what turned out to be a more favorable settlement offer." Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), cert. granted, 104 S. Ct. 2149 (1984) (citing Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L. J. 889, 901).

Section 8(2) is based on Rule 68 of the Federal Rules of Civil Procedure, where if the judgment obtained by the offeree is not more favorable than a settlement offer, the offeree must pay the costs incurred after making of the offer. In Chesny, 720 F.2d at 478-79, the court interpreted Rule 68 in a civil rights case where the judgment was less than the settlement offer. It held that "costs" do not include attorney's fees. The court found that including attorney's fees with costs would create a conflict between the policies and rationales of Rule 68 and the 1976 Fees Act. Id. at 478. The court said:

> The effectiveness of Section 1988 would be reduced if the rejection of a Rule 68 offer that turned out to be more favorable than the judgment of the plaintiff eventually received prevented the plaintiff from getting any award of legal fees that accrued after the date of the offer. That would mean in this case that the plaintiff's lawyers would have either to collect an additional fee from the plaintiffs, thus reducing the net recovery from the jury's $60,000 damage, or to swallow the time they put in on the trial. Either way, the next time they are faced with a similar offer they will have to think very hard before rejecting

> it even if they consider it inadequate, know that rejection could cost themselves or their client a lot if it turned out to be a mistake.

Id. at 478-79 (emphasis added).

There are other significant problems with the provision that make it an ineffective way of encouraging settlement. Even with the addition of the reasonableness exception in sec. 8(2)(B), a private attorney will face enormous pressure to settle a meritorious claim at an early stage rather than risk not recovering a fee at all. In addition, a conflict of interest between the attorney and client will arise when the attorney encourages settlement but the client wants to pursue the claim until judgment on the merits, especially where the client seeks only equitable relief.

Use of the "reasonableness" standard of Sec. 8(2)(B) will have a deleterious effect on civil rights, environmental and consumer litigation. Courts will, for example, have difficulty determining the reasonableness of a settlement offer where a principle of constitutional civil rights is at stake. In fact, where the claim seeks equitable relief, the court will face the difficult problem of measuring in hindsight different kinds of final judgment relief against the monetary relief usually accompanying a settlement offer in order to determine whether the settlement offer or the final relief was more favorable. In addition, to determine the reasonableness of the attorney's decision not to settle, the court may have to explore areas of attorney-client privilege that may harm the plaintiff's position on appeal.

Finally, encouraging settlement for the purpose of saving money would diminish the importance of equitable relief in the form of a declaratory judgment. Frequently, this is the ultimate purpose of civil rights litigation: a declaration by the court that some governmental activity is discriminatory often outweighs any compensatory relief that can be given.

CONCLUSION

S. 2802 should not be enacted. As we have explained above, it is riddled with both poor policy choices and numerous technical problems.

Prepared by:

Robert L. Baumann
Student Intern

Barbara R. Shufro
Staff Attorney

Institute for Public Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

September 21, 1984

Alliance for Justice
A National Association of Organizations Working for Equal Justice

NAN ARON
Executive Director

WILLIAM L. TAYLOR
Chair

MEMBERS

Business and Professional People for the Public Interest

Center for Law and Social Policy

Center for Law in the Public Interest

Center for National Policy Review

Center for Science in the Public Interest

Consumers Union

Education Law Center

Employment Law Center

Environmental Defense Fund

Equal Rights Advocates

Food Research and Action Center

Harmon & Weiss

Institute for Public Representation

Juvenile Law Center

Mental Health Law Project

National Education Association

NOW Legal Defense and Education Fund

National Wildlife Federation

National Women's Law Center

Native American Rights Fund

Natural Resources Defense Council

New York Lawyers for the Public Interest

Public Advocates, Inc.

Sierra Club Legal Defense Fund

Women's Law Project

Women's Legal Defense Fund

September 18, 1984

The Honorable Orrin Hatch
Committee on the Judiciary
Subcommittee on the Constitution
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Hearings on S. 2802, the "Legal Fees Equity Act," held by the Senate Judiciary Subcommittee on the Constitution on September 11, 1984, included testimony by a panel of three state attorneys general: Francis X. Bellotti of Massachusetts; Steve Clark of Arkansas; and David L. Wilkinson of Utah. In response to a question of Senator DeConcini, not one of these witnesses was able to recall participating in a brief filed on behalf of 43 states in support of the award of market rate fees to state attorneys general. In the interests of ensuring a complete and accurate record, the Alliance for Justice requests that the following information be included in the record of those hearings.

The brief *amici curiae* in question was filed in the case of *Illinois v. Sangamo Construction Company*, 657 F.2d 855 (7th Cir. 1981), in December of 1980. The brief was submitted over the name of Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts and one of the members of your panel. Listed as attorney for the State of Arkansas was Steve Clark, also a panel

Telephone (202) 624 8390

Mailing address 600 New Jersey Avenue N.W. Washington D.C. 20001

Street address 25 E Street N.W. Washington D.C. 20001

member. The State of Utah also joined as an amicus, although it was represented by Mr. Robert B. Hansen, Mr. Wilkinson's predecessor in office. All three states represented on your panel were signatories of the brief, and one of those states actually prepared and served that brief.

The Sangamo Construction brief contains the following language: "While Attorneys General do not have hourly rates in the same sense as private counsel, attorneys' fees awarded them under Section 4 of the Clayton Act should be based on the prevailing market rates charged by private attorneys with similar experience for similar work."[1] This is not the only inconsistency between the Attorneys General's position relating to market rate fees for civil rights attorneys and the position which they took in the Sangamo brief relating to fee computation to states' attorneys. The brief also argues, for example, that contingency is applicable to the computation of fees in favor of state Attorneys General,[2] and that fees awarded to state Attorneys General should not be based on costs as opposed to market rates.[3] Perhaps most relevant, the *Sangamo* brief makes the same conclusion that private members of the Bar have made in regard to the "Legal Fees Equity Act"; that is, the brief concludes that, although state Attorneys General have a duty to prosecute antitrust cases, the financial return on those cases will determine how many they will be able to prosecute:

---

[1] Sangamo brief, p. 5.

[2] "In choosing to pursue one antitrust action over another antitrust action, or any other type of action for that matter, the government

[Footnote Continued]

> "Finally, it must be recognized that the duty of a state Attorney General to represent the interests of his or her state, its political subdivisions or its citizens in an antitrust action is meaningless absent adequate legislative appropriation. The *amici* states, which have had the benefit of actual experience in securing legislative appropriations, can assert with certainty that appropriations for future antitrust enforcement efforts will be based significantly on past effectiveness and past effectiveness is

---

[Footnote Continued]

attorney, like the private attorney, takes a significant risk with respect to success and ultimate recovery and experiences lost income potential resulting from allocation of limited attorney resources to the action pursued as opposed to another." *Sangamo* brief, p. 7. *But see* National Association of Attorneys General, *Report to Congress on the Civil Rights Attorney's Fees Awards Act of 1976* 35-38 (1984). *See also* Brief of Amicus Curiae Commonwealth of Massachusetts in Support of Petitioner, in Blum v. Stenson, 104 S. Ct. 1541 (1984), at pp. 33-44 (August 15, 1983).

[3] "Whether attorneys' fees are being sought for a public attorney or private attorney, costs should not be a determinative factor; courts have not, and should not, become involved in cost analysis of a law office." *Sangamo* brief, p. 5. *But see* NAAG Report, note 2, *supra*, at pp. 41-46. *See also* *Blum* brief, note 2, *supra*, at pp. 47-64.

> measured in large degree by monetary recoveries, including damages and attorneys fees."[4]

The *Sangamo Construction* brief states that all 43 *amici* were, at the time of the filing, prosecuting antitrust cases in which fee awards might be recovered. Because the Alliance has been informed that the record of the September 11th hearings will be closed on the 21st, and we are also preparing an additional statement for the record, we are unable to do the research necessary to ascertain whether, and at what rates, these three states recovered for the work of their attorneys general. A cursory review of our files reveals that the Commonwealth of Massachusetts recovered market rates of up to $90 an hour, with a contingency multiplier of 1.5, for effective rates of up to $135 an hour -- 80 percent higher than this legislation's $75 cap -- in *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983). In *In re Chicken Antitrust Litigation*, 560 F. Supp. 943 (N.D. Ga. 1979), the Commonwealth sought and recovered market rate fees of $90 an hour -- 20 percent higher than this legislation's $75 cap -- but its request for a multiplier was denied. Mr. McTeer's prepared statement contains other examples of states recovering market rates and multipliers, for effective rates of up to $356.25 an hour — 375 percent higher than this legislation's $75 cap.

---

[4] *Sangamo* brief, p. 7.

The Alliance does not currently have in its files any information on fees recovered by the States of Arkansas and Utah, or additional fees recovered by the Commonwealth of Massachusetts, but will endeavor to collect that information for you in the event further hearings are held on this bill.

Very truly yours,

Nan Aron, Executive Director
Alliance for Justice

cc: The Honorable Dennis DeConcini

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON LEGAL ASSISTANCE

THOMAS H. MORELAND
CHAIR
919 THIRD AVENUE
NEW YORK, N.Y. 10022
(212) 715-9246

BONNIE BLACKLOCK
SECRETARY
919 THIRD AVENUE
NEW YORK, N.Y. 10022
(212) 715-9268

September 14, 1984

VIA EXPRESS MAIL

Hon. Orrin G. Hatch
Chairman, Subcommittee on
the Constitution
Judiciary Committee
United States Senate
SR-135 Russell Senate Office Building
Washington, D.C. 20510

Re: Hearings on S.2802,
September 11, 1984

Dear Mr. Chairman:

I chair the Committee on Legal Assistance of The Association of the Bar of the City of New York. Our Committee concerns itself with issues pertaining to the availability of legal counsel for persons unable to bear the cost of counsel themselves. We view the availability of court-awarded attorneys' fees under existing statutes, the subject matter of the above hearing, as a vital element in securing the availability of counsel, particularly in civil rights and civil liberties litigation.

I hereby submit for your Committee's consideration our Committee's lengthy report, published earlier this year, on the subject of court-awarded attorneys fees. It reviews in detail court decisions under the existing attorneys' fee award statutes, and discusses in some depth the draft legislation then under consideration by the Administration, and now before you in virtually identical form as S.2802, which would amend the existing statutes to lower the fee awards available in civil actions.

In substance, it is our view, on behalf of the Association, that the existing statutes have worked well, and have not led to excessive awards of attorneys' fees. We urge that S.2802 not be enacted, for by severely restricting potential attorneys' fee awards it would severely limit the availability of counsel in cases seeking to enforce vital statutory and constitutional rights.

Our report does not concern itself with the proposed modest increase in the compensation available under the Criminal Justice Act, which is the other subject of S.2802. We generally do favor an increase in the hourly rates available under the Criminal Justice Act, but would commend for the Committee's favorable consideration the more generous and flexible provisions in bill S.2420.

We would be happy to provide further information or testimony with respect to this legislation if it would be helpful to your Committee.

Very truly yours,

Thomas H. Moreland
Chair

THM:je
Enclosure

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036

Counsel Fees in Public Interest Litigation

By The Committee on Legal Assistance

I. *Introduction*

This report discusses a number of issues relating to the award of counsel fees in civil rights and other public interest litigation under the Civil Rights Attorneys' Fee Act of 1976 and related statutes. The report will discuss the history of counsel fee awards in the United States, the background and purposes of the counsel fee statutes, questions related to the computation of fees in these cases, and a number of related issues. The questions discussed herein are of particular importance because of recent developments in the law and the pendency before Congress of proposals which would substantially cut back on the availability of counsel fees, particularly when the defendants are public agencies.

The importance of the private enforcement of the civil rights statutes has been long recognized by both Congress and the courts. Indeed, until the passage of the Civil Rights Act of 1964 virtually all of the cases to enforce the constitutional and civil rights of Blacks and other minority Americans were brought by private parties and organizations. These cases included *Plessy v. Ferguson,*[1] the various challenges to exclusionary voting rights practices in the South,[2] and the attack on legalized segregation as it existed in the public schools,[3] parks,[4] municipal facilities[5] and other public facilities[6] throughout a large part of the country.

Indeed, until the early 1960's such litigation was carried out by a small number of private organizations aided by an equally small number of attorneys in private practice willing to so dedicate themselves, often for little or no compensation.[7] The role of the federal government was largely supportive, with only an occasional case being initiated by it because of limitations on the jurisdiction of the Department of Justice.[8] Of course, in the main, the role of state and local governments was to oppose as vigorously as possible any attempts to expand the rights of their minority citizens.[9] The various civil rights statutes passed beginning in 1957 finally gave the Department of Justice power to initiate as well as intervene in litigation. However, Congress recognized the limited resources of the federal government, and enacted counsel fee provisions in the new statutes[10] for the specific purpose of encouraging their private enforcement.[11]

That the vigorous enforcement of the civil rights laws is essential to our society can hardly be denied. The role of the courts in vindicating the constitutional and civil rights of American citizens is, of course, essential. However, the courts themselves are powerless to take any action until suits have been initiated by the government or by persons aggrieved by illegal and unconstitutional actions. Moreover, in the vast majority of instances the defendants in these actions have far greater financial and legal resources available to them. The typical civil rights plaintiff is an individual, or at best groups of individuals, only occasionally represented by an organization; the typical civil rights defendant on the other hand is an agency of the federal, state or local government or a large corporation. The availability of attorneys' fees at least partially equalizes the resources of the parties.

II. *The History and Background of the Civil Rights Fee Statutes*

Under the "American rule" parties must bear their own attorneys' fees with certain limited exceptions.[12] These include the recovery of fees out of a common fund created by the litigation[13] or fees from the other party when it has acted in an obdurate and obstinate fashion in conducting the litigation.[14] Otherwise, fees are obtainable only if provided by statute.[15] Applying these principles, the Supreme Court in 1975 held that fees could not be awarded simply because of the public interest nature of the litigation in the absence of a specific statute.[16] Although *Alyeska Pipeline Co. v. Wilderness Society*[17] involved environmental litigation, the Supreme Court disapproved a series of lower court decisions that held that fees were recoverable in all civil rights cases, including those brought under post-Civil War statutes which did not specifically provide for attorneys' fees.[18]

It was in response to *Alyeska* and in order to bring all civil rights cases under the same rule that Congress enacted the Civil Rights Attorneys' Fees Act of 1976.[19] Section 1988 of 42 U.S.C., part of the Reconstruction civil rights statutes,[20] was amended to insert a counsel fee provision whose language tracks the language found in the Civil Rights Act of 1964,[21] specifically the fee provision of Title VII.[22]

Congress was acutely aware of the need for private counsel to become involved in civil rights litigation. It was noted by both the Senate and the House that the federal government and its enforcement agencies could not by themselves carry the load necessary to bring about full compliance with the various civil rights statutes. Therefore, it was necessary that the civil rights acts be enforced by "private attorneys general." The Senate report states:

> The purpose and effect of S.2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. S.2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights

> Act Amendments of 1975, 42 U.S.C. § 1973 (e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.[23]

The House was particularly concerned with the inability of plaintiffs to obtain adequate legal help.

> In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys disclosed that such plaintiffs were the hardest hit by the decision. The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.[24]

Similar concerns were behind the parallel counsel fee provisions in Title II and Title VII of the Civil Rights Act of 1964. Thus, as the Supreme Court held in *Newman v. Piggie Park Enterprises,*[25] the purpose of the counsel fee provisions was not punitive, but rather to encourage private enforcement of the Act by removing financial impediments:

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attor-

> ney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees—* * * to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

In 1976, note was taken by Congress of the fact that civil rights plaintiffs were usually faced with opponents that had vastly greater resources.[26] It was particularly pointed out that tax money, including that of wronged plaintiffs, was used to defend against attempts to enforce constitutional rights.[27] Thus, the legislative history explicitly states that prevailing plaintiffs are to be reimbursed from public funds.[28]

The imbalance of resources in favor of defendants was a primary theme of the hearings on the bill. The Senate subcommittee heard the testimony of one of the lawyers who litigated *Alyeska*.

> In many cases we hear rhetoric about how important our citizen groups are and how our judicial system is the system within which disputes are finally settled. But the rhetoric is really empty when you get up against the cold fact that the resources available to opposing sides in many cases are so disparate.[29]

He characterized public interest litigation as a battle

> between David and Goliath. In this battle, however, Goliath holds the slingshot as well as the weight advantage . . . . The problem is that under present circumstances the corporation's citizen interest adversaries cannot devote anything approaching a comparable expenditure of resources to the development of their side of the case.[30]

Particular concern was expressed over the defense of civil rights suits with government money. Congressman Danielson of California, a member of the House subcommittee, put it graphically:

> [T]here ought to be a balancing of the power in our court. It seems to be fundamentally unfair that one party is the Government with almost unlimited resources, funds, personnel, availability of records, availability of investigating personnel, and whatnot; on the other hand you have the private citizen. What was that thing twisting slowly in the wind? He is out there all alone anyway and it is chilly out there financially.[31]

The point was made that even when the defendant is a private corporation, the defense was partly subsidized by public money since the costs of the litigation are tax-deductible.[32] It was this precise testimony that Congress heeded when it considered and passed § 1988.[33]

Congress' decisions with regard to a number of issues reflect the policy to equalize the resources of the parties. For example, it adopted a different standard for fees to a prevailing defendant.[34] In doing so, it noted that the defendants are usually governments: "Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves."[35] Congress was concerned lest it "further widen the gap between citizens and government officials and . . . exacerbate the inequality of litigating strength."[36]

The debates establish that the purpose of the Act was not simply to enable civil rights plaintiffs to obtain attorneys, but also to equalize the resources of the parties in these cases by providing civil rights lawyers with the same economic incentives to thoroughly prepare and effectively litigate their client's case as were already available to defendants' counsel. Senator Tunney, the author[37] and initial sponsor[38] of the legislation, noted in his final statement before the vote that resulted in passage that

> Unless effective ways are found to provide equal legal resources, the Nation must expect its most basic and fundamental laws to be objectively repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources . . . .
>
> When Congress calls upon citizens—either explicitly or by construction of its statutes—to go to court and vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court and to be effective once they get there.[39]

III. *Fees in Comparable Types of Litigation*

Notwithstanding the "American" rule, that each party should pay its own legal fees without regard to the result of the litigation, fees are commonly awarded to a prevailing plaintiff in many different types of litigation. Congress' recognition in 1976 that fees must be available in litigation under § 1983 if plaintiffs are to be able to take advantage of this statutory remedy was simply the latest in a series of statutes which allow attorneys' fees to successful plaintiffs. Nor has it been the last such statute. More recently, Congress provided for an award of attorneys' fees to private litigants in actions in which the United States is the adverse party, a long overdue reform which still contains many limitations.[40]

The legislative history is clear that, in adopting the Civil Rights Attorney's Fee Act of 1976, Congress intended that the statute would follow prior practice in other types of complex federal litigation. The Senate Report pointedly referred to antitrust litigation as providing a comparable standard for the award of fees under the 1976 Act.[41] Judicial practice in awarding fees in anti-trust and other types of complex federal litigation should therefore provide a useful standard under the Civil Rights Attorney's Fee Act.

The award of attorneys' fees to prevailing plaintiffs in anti-trust litigation, the type of litigation specifically mentioned in the Senate Report, is one of the most firmly established in federal law. As early as 1914 Congress provided in the Clayton Act that in addition to treble damages, the person injured by reason of a violation of the anti-trust laws was entitled to "the cost of suit, including a reasonable attorneys' fee."[42] Anti-trust litigation has also resulted in some of the largest fee awards in federal litigation. One of the largest single attorneys' fee awards in an individual suit was the award of $7.5 million for services rendered to the plaintiff in obtaining a $45.8 million (before trebling) default judgment in *TWA v. Hughes.*[43] The largest class action fee awards are also commonly awarded in the anti-trust field. A group of the "Antibiotic Cases" in the early 1970's resulted in fee awards totalling approximately $33 million; the awards were at varying rates of $125 to $296 per hour for hundreds of thousands of hours of legal services.[44] Another frequently cited field of complex federal litigation in which large fee awards are commonly granted is that of the securities laws. Several sections of the federal securities laws have specific provisions permitting a prevailing plaintiff to be awarded counsel fees, but the sections of the securities laws under which plaintiffs most frequently claim, e.g., § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b), have no explicit provision for attorneys' fees. Fees are therefore generally awarded only in securities class actions and then on the established principle that counsel for a successful class is entitled to be paid out of the fund which counsel's efforts have created for the benefit of the class. Even though in securities class actions fees are paid out of the settlement fund, rather than as a statutorily mandated add-on over and above the award or verdict, fees are still very large. Moreover, the principles governing the award of fees in securities class actions have been similar to those in the anti-trust area.[45]

A third area of complex federal litigation in which attorneys' fees have been awarded for many years is that of the federal bankruptcy laws. Counsel for the debtor, counsel for creditors' committees, and counsel for creditors who perform services of value to the proceeding are entitled to apply for and recover fees paid by the estate. Practice was different under different chapters of the Bankruptcy Act but were made uniform and expanded in the Bankruptcy Reform Act of 1978.[46] Significantly, in the 1978 Code, Congress also terminated the prior practice of awarding lawyers in bankruptcy cases fees below those they would be entitled to recover in comparable types of litigation. The principle that bankruptcy lawyers should be paid on a second-class basis had been fairly widely accepted on the theory that the estate of the bankrupt entity would thereby be protected. *Massachusetts Mutual Life Insurance v. Brock,* 405 F.2d 429, 432 (5th Cir. 1968). In the 1978 Code, Congress expressly rejected this history and determined that it was not good public policy to create an inferior class of lawyers who would practice before the Bankruptcy Courts and be paid on an inferior basis.[47]

A recent survey of anti-trust and securities cases found that the *average* base hourly rate (before any adjustments for inflation or other contingencies were made) for all attorneys regardless of experience or expertise in anti-trust and securities class actions over a period of years up to 1980 was $92.50 per hour.[48] Of course, fees for attorneys with more experience were significantly higher and after adjustments the average fee was over $200.[49] The Committee has done a survey of selected cases in the Southern District of New York and has similarly found that average hourly fees in recent years were comparable.[50]

With regard to civil rights cases the most comprehensive recent survey of fees in Title VII employment discrimination cases demonstrates rates at significantly lower levels. Thus, rates have been as low as $5 per hour, with awards in most cases being between $35 to $75 per hour.[51]

Decisions handed down recently do indicate a general improvement. Thus the Court of Appeals for the Seventh Circuit recently held that, based on the record before it, rates of $175 to $200 per hour for experienced Title VII attorneys in Washington and New York were appropriate.[52] A recent district court opinion in a school desegregation case in Texas held that rates as high as $160 per hour for experienced civil rights attorneys were also established.[53]

Although such awards still appear to be the exception rather than the rule, they do indicate an encouraging trend towards a realization by the courts that unless fees are awarded in civil rights cases that are comparable to those provided in other types of litigation there will not be a sufficient number of private attorneys willing to take on this often difficult and complex category of cases.[54]

In the New York area, although some district court cases have awarded hourly rates from $75 to $125 per hour,[55] recent decisions of the Second Circuit evidence a growing reluctance to approve fees in civil rights cases at market hourly rates. In one case, the court reversed an award on the ground that fees to non-profit organizations should be made pursuant to a different standard than that applicable to private attorneys.[56] The ruling was contrary to decisions of every other circuit,[57] including two earlier decisions of the Second Circuit itself,[58] as well as to the legislative history of the 1976 Act.[59] The Second Circuit rule was overruled by *Blum v. Stenson*,[60] in which the Supreme Court rejected the argument that fees should be calculated on a different basis if the attorney were employed by a non-profit agency. Relying on the legislative history of the Act, the Court held that the market rate for attorneys of comparable experience governed. In so doing it upheld hourly rates of $95 and $105 per hour awarded to Legal Aid Society attorneys with relatively short times in practice. In yet another case the Second Circuit affirmed the refusal of the district court to approve a negotiated fee agreement on the grounds that fees in civil rights cases should be "moderate."[61]

A crucial issue in establishing adequate fees is the method of computation and the proof required to establish appropriate hourly rates. These matters will be discussed in parts IV and V of this report.

IV. *Approaches to Fee Computation*

For years there were nearly as many approaches to the proper way of computing fee awards as there were courts of appeals. Recent decisions of the Supreme Court establish that the method to be used involves establishing the number of hours spent in the litigation, multiplying that amount by a reasonable hourly rate, and then, in some instances, adjusting the resulting figure upward or downward based on a variety of additional factors. In its recent decision in *Hensley v. Eckerhardt*,[62] the Supreme Court cited with approval the comprehensive *en banc* decision of the Court of Appeals for the District of Columbia Circuit in *Copeland v. Marshall*.[63] In *Hensley* and more recently in *Blum v. Stenson* the Court also endorsed the basic approach adopted by the Fifth Circuit in the leading case on counsel fee computation, *Johnson v. Georgia Highway Express*.[64]

A. *The Varying Approaches*

The lodestar method of fee computation—it is truly a method rather than just an approach—involved three steps. First, the hours expended are multiplied by counsel's normal hourly rates to obtain a lodestar sum. Second, this lodestar sum can be increased by a multiplier or percentage to reflect such contingency factors as the risks involved in not winning (*i.e.*, nonpayment), the difficulty of the case, and the delay in payment. Third, the lodestar may be increased or decreased to reflect various quality factors focusing on the extraordinary nature—good or bad—of counsel's representation. This method of fee computation, first adopted by the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.* ("*Lindy I*"),[65] was formally adopted by four other courts of appeals, was permitted by the others, and has been widely used by all trial courts in anti-trust and securities fee determinations.

In *Blum*, however, the Supreme Court declined to apply the lodestar methodology as developed in *Lindy* to civil rights cases. Instead, it held that factors such as quality of representation should be used to calculate the hourly rate itself. It also held that a contingency adjustment for risk had to be supported by evidence in the record, and not simply by argument of counsel.[66]

The decision in *Blum* followed the legislative history of the Act and endorsed the *Johnson* approach which involves consideration of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*[67] A similar approach involves consideration of the eight factors listed in the ABA Code of Professional Responsibility, Disciplinary Rule 2-106.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, indicates that the *Johnson* factors are to be applied:

> The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Standard Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975).[68]

Interestingly, the courts in *Stanford Daily* and *Davis* expressly applied the lodestar method. *Stanford Daily* observed that the lodestar method simply "present[s] a procedure for ordering the examination of factors" and "thereby complements the discussion offered in *Johnson*."[69]

B. *The Approaches Applied by The Courts of Appeals*

Prior to *Hensley* and *Blum*, five courts of appeals required application of the lodestar method. Other courts, while sometimes allowing the lodestar method, allowed or followed other approaches or even combinations thereof.

FIRST CIRCUIT

The First Circuit initially directed its trial courts to consider the twelve *Johnson* factors, holding that the factors were similar to the eight factors in Disciplinary Rule 2-106.[70] More recently, however, in *Furtado v. Bishop*,[71] the First Circuit formally approved and applied the lodestar method.

SECOND CIRCUIT

Shortly after the Third Circuit's seminal decision in *Lindy I*, the Second Circuit in *Detroit v. Grinnell Corp.*[72] formally adopted the lodestar method. It was consistently followed[73] until recently, when the court applied a version of the "cost-plus" method discussed below to a fee award to a public interest organization.[74]

THIRD CIRCUIT

The lodestar method, initially formulated by the Third Circuit in *Lindy I*, has been rigorously followed and even refined somewhat in a number of subsequent cases.[75]

FOURTH CIRCUIT

In *Anderson v. Morris*,[76] the Fourth Circuit in 1981 formally adopted the lodestar method, implicitly rejecting its prior deference to the unguided consideration of the *Johnson* factors.[77]

FIFTH CIRCUIT

Although the Fifth Circuit initially formulated the *Johnson* factors, the court several years ago began to place primary emphasis on the hours expended times reasonable billing rates.[78] The court has emphasized that the factors are to be applied flexibly, rather than as a rigid formula with hours times hourly rate the starting point.[79] In recent cases the court has expressly endorsed the lodestar method as fully compatible with *Johnson*.[80]

SIXTH CIRCUIT

In *Northcross v. Board of Education of Memphis*[81] the Sixth Circuit expressly rejected the *Johnson* approach in favor of a modified lodestar method. Under the Sixth Circuit's new approach, hours are to be multiplied by normal billing rates with an allowance for increased billing rates based on such contingency factors as the risk involved and the delay in payment.

SEVENTH CIRCUIT

The Seventh Circuit has rather consistently directed trial courts to consider the eight factors listed in Disciplinary Rule 2-106.[82] At the same time, the court has approved increases in normal billing rates to reflect various contingency and quality factors.[83]

EIGHTH CIRCUIT

Use of the lodestar method is permissible in the Eighth Circuit.[84] The court has also allowed use of the *Johnson* factors at least so long as "the minimum award [is] not less than the number of hours claimed times the attorney's regular hourly rate."[85]

NINTH CIRCUIT

In *Brandenburger v. Thompson*,[86] the Ninth Circuit held that trial courts were free to follow the lodestar method set forth in *Lindy I* or simply to consider the twelve *Johnson* factors. For several years thereafter, the court also approved other approaches to fee computation. Recently, however, the Ninth Circuit has held that the *Johnson* factors, as set forth in *Kerr v. Screen Extras Guild, Inc.*[87] must at least be considered.[88]

TENTH CIRCUIT

The Tenth Circuit has been the least specific of all courts of appeals in announcing a particular approach to fee computation. It appears sufficient for trial courts simply to consider several of the *Johnson* factors.[89]

ELEVENTH CIRCUIT

Under an Eleventh Circuit ruling that prior Fifth Circuit decisions would be considered binding,[90] it is permissible to apply the *Johnson* factors with emphasis on hours times billing rates, or to use the lodestar method.[91]

DISTRICT OF COLUMBIA CIRCUIT

After years of deference to the *Johnson* factors, the District of Columbia Circuit formally adopted the lodestar method in its *en banc* decision in *Copeland v. Marshall.*[92]

The "Cost-Plus" Method

In the original panel decision in *Copeland v. Marshall*[93] the District of Columbia Circuit announced a new method of calculating fees based on the actual cost to the firm plus an amount for a "reasonable" profit.[94] The court *en banc* rejected the approach in favor of the lodestar method, citing, *inter alia*, its undue complexity and burdensomeness.[95] As noted above, however, the Second Circuit recently endorsed a variant on "cost-plus" for calculating fees to public interest groups.[96] However, the Supreme Court rejected the arguments of the State of New York and the United States as amicus curiae that it should adopt the "cost-plus" method, as opposed to the market value method, for all fee calculations.[97] The Court also rejected the Second Circuit's alternative to cost-plus, *i.e.*, its approach of a straight cost basis to be applied to public interest or non-profit law organizations.[98] Thus, as a result of the decision in *Blum v.*

Stenson fees are to be determined based on market rates in all cases.

V. *Proof of Fees*

Issues of what proof is necessary to establish the amount of attorneys' fees have been extensively litigated in recent years. With the Supreme Court's endorsement of the market rate method of computing fees in *Hensley*,[99] and *Blum*[100] a number of principles are now well established. The most detailed body of recent law is found in a series of decisions in the District of Columbia Circuit following *Copeland v. Marshall*[101] as well as decisions in the Fifth[102] and Sixth[103] Circuits.

A. *Establishing The Basic Amount, or "Lodestar"*

1. *Hours Expended*

In earlier years, the courts were sympathetic to claims of civil rights attorneys that they did not keep detailed contemporaneous time records because they did not expect to be awarded fees.[104] More recently, however, courts have made it clear that fee applications must be based on accurate and adequate time records which document dates, time spent, and a reasonably detailed and coherent description of the work done for each entry.[105] Thus, attempts to reconstruct time are far less likely to be accepted for work done since the 1976 Act became effective.

2. *Reasonableness of the Time*

Simply documenting the amount of time spent is only the first step. The court must also decide whether the time expended was reasonable. In *Hensley* the Supreme Court stated the general rule that if time would not be properly billed to a client, then it may not be recovered from the opposing party.[106] In other words, counsel must exercise the same billing judgment that he or she would if the client were paying.

Under *Hensley*, time spent on "clearly severable" issues upon which the plaintiff does not prevail should be deleted.[107] Duplicative work or general research that does not lead to any specific benefit to the client should be excised.[108] Plaintiff should object, however, to either opposing counsel or the court engaging in "Monday-morning quarterbacking." The question is whether the work was reasonable when it was done, not whether upon hindsight it does not appear to have been necessary.[109]

3. *Reasonable Hourly Rates*

An issue that has led to much litigation is the establishment of a reasonable hourly rate for, as the Court noted in *Blum*, "determining an appropriate 'market rate' for the services of a lawyer is inherently difficult."[110] If plantiff's counsel has a regular fee-generating practice, the best evidence is his or her normal billing rate, with an adjustment because of contingency.[111] This can be reinforced by affidavits from practitioners attesting to the rate being within the general range prevailing in the relevant community for attorneys of comparable experience and expertise who engage in analogous litigation.[112] Affidavits from the attorneys themselves attesting to their experience, expertise, billing rates, etc., are essential components.[113]

Also relevant are awards in similar cases.[114] Pursuant to the legislative history of the 1976 Act, this would include not only civil rights cases, but other "complex federal litigation."[115] Therefore, it would be well to submit a compendium of recent court awards as well as a list of cases in which the attorneys involved have been awarded fees.[116]

It is by reviewing various combinations of these factors that a court may arrive at the "market value" of an attorney's services.[117] Even if an attorney is not in private practice or does not have fee-paying clients, the inquiry is the same.

4. *Defendants' Burden and the District Court's Discretion*

In recent cases courts of appeals have made it abundantly clear that once a plaintiff has properly documented hours and hourly rates, the defendant must attack them by evidence.

Thus, the District of Columbia Circuit has criticized the government for simply interposing general objections to requested fees.[118]

Similarly, a trial court may not arbitrarily reduce hours or rates without explanation.[119] Concise but adequate findings are necessary for appropriate appellate review.[120] Indeed, dissatisfaction with some district court opinions simply reciting the *Johnson* factors and then announcing a result was a prime factor in the adoption by some courts of appeals of the lodestar method.[121]

B. *Adjustments to the Lodestar*

As *Hensley* and *Blum* confirm, the lodestar amount may be adjusted upwards or downwards depending on a number of factors. These can include the extent of success (downward if low, upward if "exceptional")[122] and compensation for delays in payment.[123] After *Blum*, however, the base rate itself should account for quality of representation, and that factor may not be used to adjust the lodestar.[124]

With regard to the risk of losing, *Blum* makes obtaining a contingency adjustment more difficult.[125] However, in the Committee's view, the contingent nature of the litigation must be accounted for because the typical civil rights or other public interest plaintiff not only does not have the money to pay attorneys' fees, but also may not have funds to meet the costs of this complex and time consuming litigation. The resources of public interest organizations are limited,[126] and to the extent they cannot fund litigation the often substantial costs may have initially to be incurred by the law firm representing the plaintiff.[127] If the case is lost that money is not easily recoverable, and the firm therefore not only takes the risk of not receiving any fees, but also of being substantially out of pocket. A contingency adjustment, or the chance of obtaining one, serves as a further incentive to attract practitioners to this type of litigation. As an alternative, higher hourly rates than charged by attorneys who get paid win or lose can be used.[128] *Blum* makes it clear that the use of either method must have support in the record.[129]

An adjustment, as explained by the Court of Appeals for the District of Columbia Circuit in *Copeland*, is also necessary to compensate for delay in payment.[130] Basically, the setting of a basic fee based on a market rate establishes a fee which represents what comparable attorneys would obtain in the market place. It is an estimated rate reflective of the billing practices of average practitioners, *i.e.*, firms that bill and get paid on a current basis regardless of the outcome of the litigation. Consequently, it does not provide adequate compensation for contingent fee plaintiffs' attorneys, for it does not take into account the loss in value of money because of inflation or the loss of the use of the money because of delay in payment.

The ultimate fee awarded must take into account these factors if it is to provide full compensation. This can be done most appropriately under *Blum* in calculating the hourly rates themselves. For example, if the hourly rates are based on current rates, the rates themselves will compensate for delay in payment, and there should not also be an upward adjustment to compensate for that same factor.[131]

C. *Procedures*

Appellate courts, including the Supreme Court in *Hensley* and *Blum*, are unanimous in urging that fees should be negotiated[132] and should not become the subject of lengthy discovery,[133] hearings,[134] or appeals[135] except when essential. Even though hearings may be required when there are disputed facts[136] the courts recommend that they be focused and as limited as possible.[137] The District of Columbia Circuit requires that the defendant describe with specificity the subject matter of both proposed discovery and hearings as a precondition to obtaining either.[138]

There is also a growing body of law that prevailing plaintiffs should receive undisputed amounts of fees pending any appeal.[139] Otherwise, "the public policy dictating that attorneys' fees be awarded" will be "completely undercut by routine delays in payment." Such delays will "dampen substantially attorneys' enthusiasm to undertake [civil rights] cases."[140]

VI. *Proposals to Modify the Fees Statutes*

A. *S.141*

There has been before the Senate a proposal to substantially cut back on the scope of the 1976 Act by modifying certain provisions of 42 U.S.C. § 1988.[141] The amendment would add a new section, 42 U.S.C. § 1988A, which would limit and condition the circumstances under which fees can be awarded in civil rights cases and would put limitations on the amount of such fees.

The bill prohibits multipliers and contains an offer of judgment provision which would prohibit a fee for any part of litigation subsequent to a declined offer of settlement, "when such offer was substantially similar . . . as the relief ultimately awarded by the court."[142] The vagueness of the operative language, "substantially similar," would necessarily pose great difficulties to plaintiffs' counsel in deciding whether to accept an offer. Moreover, the provision would legitimatize defendants' proposing settlements tied to the amount of fees and would result in a conflict of interest between the civil rights attorney and the clients, since the lawyer would have to weigh the adequacy of the settlement proposal against the danger of receiving no fees at all if he or she decided to go forward and seek full vindication of the clients' rights. Thus, this part of the proposed bill is in apparent conflict with the Association's recent opinion on the ethics of such settlement proposals in the context of civil rights litigation.[143] Other provisions would significantly change existing law to the disadvantage of plaintiffs' attorneys and therefore to the discouragement of many lawyers who otherwise might become involved in this type of litigation.[144]

In addition to the bill currently before the Senate, the Department of Justice and the Office of Management and Budget have been developing for some time a more comprehensive attack on attorneys' fees in cases in which federal, state, or local government agencies are the defendants.[145] The most current version[146] would, *inter alia*, set an absolute $75 per hour maximum rate,[147] would elimate all upward multipliers, and would permit fees to be reduced or denied entirely under a variety of circumstances. These would include findings that the prevailing party engaged in conduct that "unreasonably protracted the final resolution of the controversy,"[148] the amount of fees would "unreasonably exceed the hourly salary of the attorney" (overruling *Blum v. Stenson*), the time and legal services were "excessive", or the amount of fees would "unreasonably" exceed the monetary result or injunctive relief achieved. A catch-all provision allows a reduction or denial when it "would otherwise be appropriate under the applicable fee-shifting statute." These provisions would place almost unlimited discretion in the hands of the court to reduce or deny fees, a total reversal of the existing law that full fees are to be awarded as a matter of course.

Another provision requires that any monetary judgment be reduced up to 25% by the amount of fees awarded. Thus, for example, in a class action Title VII case with a large monetary recovery for back pay, the entire fee could come out of the award to the prevailing plaintiffs rather than from the defendant. Since the purpose of back pay awards is to make the victims of discrimination whole,[149] this provision would undermine a key provision of the civil rights laws.

B. *The Rationales for the Proposed Revisions*

A number of reasons have been advanced by the sponsors of the pending and proposed legislation as to why modifications of Section 1988 and other fee statutes are required. The reasons stated are in direct contradiction to the findings and concerns established by the 1976 legislative history.

In 1981 testimony before the Senate subcommittee considering amendments to § 1983[150] emphasized alleged burdens on state and local governments because of frivolous lawsuits and because such litigation was sponsored by large civil rights organizations.[151] With regard to the first assertion, under any statute there is bound to be some baseless litigation. The present fee statutes provide a remedy since plaintiffs who bring or pursue baseless cases are liable for attorneys' fees.[152] On the other hand, there is a vast amount of litigation which is either meritorious or not baseless even though the plaintiff may eventually lose. To impose substantial restrictions on the ability to recover full fees because of some indeterminate number of frivolous cases appears to be a remedy far more stringent than the problem addressed.

With regard to the second assertion, the idea that local governments are being abused by vast resources of civil rights organizations is simply a misperception. It was argued that civil rights organizations "typically direct a test case against small local governments with limited financial and legal ability," giving as one example a suit on behalf of black police officers brought against the City of Louisville, Kentucky, by the NAACP Legal Defense Fund.[153] Representatives of the Fund pointed out, however, that the organization, operating on a small staff and budget, was also involved in litigation against, *inter alia*, such governmental agencies as the Army, Navy, Marine Corps, NASA, United States Postal Service, the cities and states of New York and the City of New Orleans besides a large number of major corporations.[154] Thus, it is clear that there is an imbalance of resources but it is still heavily in favor of governmental agencies.

A second rationale given is that the government should not subsidize litigation, particularly against itself. However, as noted above, government funds are used routinely to subsidize the defense of civil rights cases whether the defendant wins or loses.[155] Such subsidies are in the form of both direct expenditures when government agencies are sued and indirect ones when tax exemptions are provided to corporations for legal fees incurred in defending civil rights statutes. Plaintiffs, of course, receive such "subsidization" only if a court determines that a governmental agency has violated the law, or a settlement is reached. While an evenhanded rule barring *all* government subsidization of fees in civil rights actions might be arguable, one which severely limits fees paid to prevailing plaintiffs but which freely expends funds to defend such actions regardless of their outcome is simply inequitable.

In the section-by-section analysis of and in the findings and purposes section of the DOJ/OMB bill it is asserted that an alleged "lack of standards" has resulted in "many" excessive awards of attorneys' fees. No data whatsoever is provided to support the latter proposition. As to the former, as has been discussed above, there is in fact a well developed and consistent body of law governing the award of fees. In any particular case the defendant can—and often has—demonstrated that either too many hours or too high hourly rates have been sought.

Another rationale, related to the others, is that there are an unspecified number of attorneys purportedly getting rich by bringing actions against governmental agencies.[156] These lawyers have not been identified and, indeed, Congress found in 1976 that there were far too few lawyers involved in civil rights cases because of the lack of financial incentives to bring such cases.[157] To the extent there is a concern that public funds are being paid unnecessarily to prevailing civil rights plantiffs, it also might be well to scrutinize with care the litigation tactics of government attorneys. A number of courts have noted that they have chosen to litigate cases to the bitter end and then have complained about the amount of fees that must be paid.[158] As the Court of Appeals for the District of Columbia noted in its *en banc* decision in *Copeland v. Marshall,*[159] the government cannot have it both ways.

The government's litigation tactics can apply to either the merits of the case or the fee award itself. It is not uncommon for government defendants to require plaintiffs' lawyers to litigate and relitigate numerous issues, then finally to settle on the merits just prior to trial.[160] Counsel fee negotiations also can be greatly drawn out, with the government taking positions on fees which result in larger fees being awarded than would have been the case if a reasonable settlement had been reached earlier.[161] The Committee is concerned with the apparent lack of attention either by the proponents of the bills in Congress or by the Office of Management and Budget and the Department of Justice to the problem of the extent to which government litigation tactics are themselves responsible for large fee awards.[162]

Finally, the complaint that some lawyers are or may be building thriving practices by handling civil rights cases simply ignores the economic realities upon which the fee provisions are based. Quite simply, Congress is aware that the resources of the federal government are not sufficient to enforce such litigation.[163] In order to provide for effective and widespread private enforcement there must be sufficient incentives so that significant numbers of the private bar become involved. It is for this reason that the reports accompanying the 1976 Act mandate that the same standards for awarding fees which control in other complex federal litigation, such as anti-trust and securities, also govern awards in civil rights cases.[164]

As discussed above, although the situation has improved in very recent years, the general pattern has continued to be that awards in civil rights cases are below those which have long been routine in anti-trust, securities, and similar litigation. Thus, for Congress now to single out civil rights, environmental, and other categories of public interest litigation for disfavored treatment, while not disturbing the standards which control in actions brought against federal agencies under the Equal Access to Justice Act or against private concerns in antitrust and securities litigation, is to do exactly the opposite of what is required to ensure effective enforcement of the civil rights statutes.

VII. *The Present Need*

The necessity for adequate fees for plaintiffs' attorneys in civil rights and other public interest litigation is particularly great today because of an increased need for broader involvement of the private bar and public interest legal organizations in representing plaintiffs in civil rights cases. Thus, the passage of the Equal Employment Opportunity Act of 1972[165] expanded the coverage of Title VII of the Civil Rights Act of 1964[166] to include state, local and federal government agencies. In the case of federal employment, enforcement of the prohibitions against discrimination[167] is dependent solely on the private and public interest bar. Thus, while the government can bring actions against private employers through the Equal Employment Opportunity Commission[168] and against state and local governments through the Department of Justice,[169] there is no public attorney general to bring such actions against federal agencies themselves.[170]

More recently, positions taken by the Department of Justice (including the Civil Rights Division) have thrust a much greater burden on private agencies and individuals to achieve the effective enforcement of the civil rights statutes. Thus, the government in recent terms of the Supreme Court has, for the first time since the passage of the 1964 Civil Rights Act, filed *amicus* briefs on the side of employers dealing with such important questions as the scope of class actions,[171] defenses to claims that tests and other devices unlawfully excluded blacks from employment,[172] and the legitimacy of affirmative action remedies for employment discrimination.[173] In its role as defendant in Title VII cases the government was joined by the

Chamber of Commerce and the AFL-CIO in urging new rules in individual Title VII cases that would cast substantially heavier burdens on plaintiffs in order for them to establish a *prima facie* case of discrimination.[174] Perhaps the most dramatic example of the government's retreat in the High Court from its long tradition of seeking the vigorous enforcement of civil rights was its recommendation that independent counsel be appointed to defend the Internal Revenue Service's policy of denying tax-exempt status to private institutions of higher learning that practice racial discrimination.[175]

The increased burden of enforcing civil and constitutional and civil rights cannot be borne by privately funded organizations such as the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund, and the Lawyers' Committee for Civil Rights Under Law.[176] These organizations have limited staffs and carry out nationwide litigation programs covering a wide variety of civil rights matters.[177] They must rely to a significant degree on the work of attorneys in private practice to carry out their programs. These attorneys are often in small firms or are single practitioners. Only the possibility of receiving adequate attorneys' fees allows these organizations to associate such attorneys with them.

Unfortunately, a combination of delays in receipt of fees and inadequate amounts of fees when awarded can have the effect of driving out of the civil rights field many attorneys who would otherwise remain involved in these cases. As the Fifth Circuit has noted, in holding that interim fees should be awarded in complex Title VII cases:

> There is a danger that litigants will be discouraged from bringing [Title VII] suits because of the risks of protracted litigation and the extended financial drain represented by such a risk. An award of interim attorneys' fees will prevent extreme cash-flow problems for plaintiffs and their attorneys. . . . Otherwise, the danger exists that de-

> fendants in Title VII suits may be tempted to seek victory through an economic war of attrition against the plaintiffs.[178]

In short, if a firm can obtain higher fees in commercial litigation, securities fraud and anti-trust cases, etc., there will be a negative incentive to move away from civil rights litigation and to concentrate efforts on more profitable aspects of the practice.[179] In contrast, attorneys defending civil rights cases generally charge rates comparable to those charged to defend other types of complex federal litigation. For example, the *defense* of Title VII cases can be a lucrative business, and there is no shortage of attorneys ready to represent fee-paying company clients. The reason is obvious—such attorneys are paid going market rates. If the converse is not true, *i.e.*, if the going market rate does not determine *plaintiffs'* attorneys' fees, then there will be an even further imbalance of resources in favor of defendants in these cases. As the Sixth Circuit has held:

> Focusing on the fair market value of the attorney's services will best fulfill the purposes of the Fees Awards Act, by providing adequate compensation to attract qualified and competent attorneys without affording any windfall to those who undertake such representation. The entire purpose of the statutes was to ensure that the representation of the important national concerns would not depend upon the charitable instincts of a few generous attorneys.[180]

The federal courts have long recognized the difficulty plaintiffs have in locating counsel. Both the Eastern and Southern Districts of New York have found it necessary to institute plans to obtain attorneys to represent plaintiffs in civil rights cases.[181] Recently, the Chief Judge of the Eastern District of Michigan issued a plea to members of the Bar "to give some of [their] time and professional skill" in order to represent civil rights plaintiffs adequately.[182] And the Association is currently involved in establishing its own program to recruit and coordinate attorneys for *pro bono* work in a wide range of cases in which it is now difficult for persons of modest means to obtain representation. The very need for these actions attests to the shortage of attorneys in the private bar willing or financially able to take on these cases.

Conclusion

In 1976, Congress sought to ensure that counsel fees would be available in all civil rights cases. It acted on a considered judgment that adequate fees were an essential part of the enforcement scheme of the civil rights acts. The inability of the federal government—because of either limited resources or legal inhibitions—to accomplish by itself the massive job of ending discrimination and other violations of civil and constitutional rights required that individual plaintiffs be encouraged to act as "private attorneys general."

In the main, the courts have properly construed the fee provisions liberally in order to carry out their remedial purpose. By their decisions and their efforts to involve the private bar in a number of ways in civil rights litigation, the courts have validated Congress' judgment when it enacted the various fee provisions.

In view of the seriousness of the present situation with regard both to access to the courts by plaintiffs of limited means and to the enforcement of civil rights in general, the Committee believes it imperative that the Bar reiterate its support for the provision of representation that is in the public interest. The Committee believes that this can be accomplished only by the broad participation of the bar generally through the provision of adequate fees to overcome the very real financial impediments to involvement in this complex and time-consuming litigation.

The Committee takes particular note of the fact that the present proposals are directed mainly at civil rights and other public interest type litigation. Thus, they specifically would not affect fee awards under the Equal Access to Justice Act, which is designed primarily for the benefit of small businesses that become embroiled in ligitation with the government. It would also have no impact whatsoever on fee recoveries in anti-trust, securities, or bankruptcy cases, which have for many years been far larger than recoveries in civil rights cases. Thus, the proposals are not part of an overall attempt to reform some purported problem in the structure of attorneys' fees; rather, they single out public interest litigation to be a disfavored category. The Committee feels that such a step would be highly regressive and would result in the undermining of the vigorous enforcement of the laws which are among the most important in our system of government: those which protect the civil and constitutional rights of the ordinary citizen.

Committee On Legal Assistance
Thomas H. Moreland, *Chair*

Arthur H. Aufses
Mary S. Boast
Janet M. Calvo
Marshall J. Cohen
Gary E. Crawford
Janet R. Fink
Richard A. Garvey
Toby Golick
August Edward Grashof
Allan L. Gropper
Dale Steven Johnson
Helen D. Johnson
William F. Kuntz, II
Ronald Jay Levine
Robert P. Lo Bue
Christopher H. Lunding
Margaret H. McDowell
Charles Stephen Ralston*
Charles J. Raubicheck
Randye S. Retkin
Gerald A. Rosenberg
Barbara A. Schatz
Turner Smith
Kim Hoyt Sperduto
David W. Weschler

**Chair of Subcommittee.*

FOOTNOTES

[1] 163 U.S. 537 (1896). See Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, (Assoc. of the Bar of the City of New York, 1975) pp. 12-15, for an account of the litigation campaign leading up to the decision in *Plessy*.

[2] *E.g., Nixon v. Herndon*, 273 U.S. 536 (1927); *Lane v. Wilson*, 307 U.S. 268 (1939); *Terry v. Adams*, 345 U.S. 461 (1953).

[3] *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Oklahoma State Bd. of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955). See Greenberg, *op. cit. supra* at pp. 16-23.

[4] *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955).

[5] *Holmes v. City of Atlanta*, 350 U.S. 879 (1955).

[6] *Browder v. Gayle*, 352 U.S. 903 (1956) (city buses); *Detroit Housing Authority v. Lewis*, 226 F. 2d 180 (6th Cir. 1955) (public housing).

[7] See Kluger, *Simple Justice* (Alfred A. Knopf, Inc., N.Y. 1975), for an exhaustive discussion of the campaign to end segregated schools and of the pivotal roles of the NAACP and the NAACP Legal Defense and Educational Fund, Inc. in that effort.

[8] Most of the Department's activities were limited to bringing criminal conspiracy prosecutions under the Reconstruction Civil Rights Acts (see *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn v. United States*, 238 U.S. 347 (1915); *United States v. Saylor*, 322 U.S. 385 (1944)), and filing *amicus curiae* briefs in support of civil rights plaintiffs. See, *e.g., Brown v. Board of Education, supra*. The government could also intervene in privately initiated litigation if orders of the federal courts were defied. See, *e.g., Cooper v. Aaron*, 358 U.S. 1 (1958); *United States v. Barnett*, 376 U.S. 681 (1964).

[9] See, *e.g.*, cases cited in nn. 2-8, *supra*.

[10] 42 U.S.C. §§ 1973l(e) (voting); 1988 (general); 2000a-3 (b) (public accommodations); 2000e-5 (k) (employment); § 3612 (c) (housing).

[11] *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). See *Attorneys' Fees for Public Interest Participation in Federal Agency Proceedings*, Report of the Committee on Federal Legislation (The Record, Dec. 1976, p. 675), for an earlier discussion of the need to encourage private bar involvement in public interest litigation.

[12] *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

[13] *Hall v., Cole*, 412 U.S. 1 (1973).

[14] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67 (1980), *Alyeska Pipeline, supra* at 258-59.

[15] *Id.* at 260-61.

[16] *Id.* at 263-64.

[17] 421 U.S. 240 (1975).

[18] *Id.*, at 270, n. 46.

[19] S. Rep. 94-1011, 94th Cong., 2nd Sess. (1976), p. 1.

[20] R.S. § 722.

[21] P.L. 88-352; 42 U.S.C. §§ 2000 et. seq.

[22] 42 U.S.C. § 2000e-5 (k). Because of the similarity of language, the Supreme Court has held that the legislative history of the 1976 Act can be used as a guide in interpreting Title VII's fee provisions. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71, n. 9 (1980).

[23] S. Rep. 94-1011, 94th Cong., 2d Sess. (1976), p. 2.

[24] H. Rep. 94-1558, 94th Cong., 2d Sess. (1976), pp. 2-3.

[25] 390 U.S. 400, 402 (1968).

[26] H. Rep. 94-1558, *supra* at p. 7.

[27] *Ibid.*

[28] *Ibid.;* S. Rep. 94-1011, *supra* at p. 5.

[29] *The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate,* 93rd Cong., 1st Sess. at 834-35 (1973). (Hereinafter, "Senate Hearings.")

[30] *Senate Hearings* at 84.

[31] *Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. at 61. Congress heard specific examples. There was

> the Prince Edward County [school desegregation] case, which was one of the serious instances of contemptuous violation of law. . . . We find in that case, which has gone on for nearly 15 years, there was only one phase during the entire case during which the plaintiffs' lawyers were awarded fees paid and that amounted to $19,000.
>
> During that same period, the school board lawyers, the county lawyers and the State's lawyers were getting their fees paid in full at all times. . . . [B]ut for the same period in which the plaintiffs' lawyers were awarded $19,000, the defendants paid their lawyers $150,000 for the service of having enabled them to go into contempt of court.

Senate Hearings, supra at 857.

[32] *Senate Hearings, supra* at 835-36.

[33] H. Rep. 94-1558, *supra* at pp. 2-3.

[34] *Id.* at 6-7; *Hughes v. Rowe,* 449 U.S. 5 (1980).

[35] H. Rep. 94-1558, *supra* at p. 7.

[36] *Ibid.*

[37] 121 Cong. Rec. S.14975 (daily ed. Aug. 1, 1975).

[38] 122 Cong. Rec. S.17051 (daily ed. Sept. 29, 1976).

[39] *Ibid.*

[40] Equal Access to Justice Act, Title II of P.L. 96-481; 5 U.S.C. §§ 504, 28 U.S.C. § 2412.

[41] The Senate Report states:

> "It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases . . ." S. Rep. 94-1011, p. 6; see also, H. Rep. 94-1558, pp. 8-9.

[42] 15 U.S.C. § 15.

[43] *TWA v. Hughes,* 312 F. Supp. 478 (S.D.N.Y. 1970), *modified,* 449 F. 2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973). The subsequent reversal on other grounds by the United States Supreme Court has not detracted from the precedential value of this case. In *In re Brown Co. Securities Litigation,* 355 F. Supp. 574 (S.D.N.Y. 1973), the Court cited *TWA v. Hughes* in awarding the plaintiffs' attorneys a substantial fee.

[44] *West Virginia v. Charles Pfizer & Co., Inc.,* 1973 Trade Cases, ¶74827 (S.D.N.Y. 1973). Very large fee awards in anti-trust class actions have come commonplace in recent years. *See Attorney Fee Award in Antitrust and Securities Class Actions,* 6 Class Action Reports 82 (1980).

[45] While securities law settlements tend to be smaller than those under the antitrust laws, and counsel fees also somewhat smaller, the grant of multi-million dollar awards has been common in recent years. Such awards include $1,646,000 in *Beecher v. Able,* 435 F. Supp. 397 (S.D.N.Y. 1975) (three trials over a period of 10 years and $5 million recovery to the class); $1,396,000 in *Blank v. Talley Industries Inc.,* 390 F. Supp. 1 (S.D.N.Y. 1975) (4 years of litigation and a settlement fund of

approximately $10,500,000); $1,600,000 in *Gerstle v. Gamble-Skogmo, Inc.*, 366 F. Supp. 638 (E.D.N.Y. 1973), *mod. and aff'd*, 478 F.2d 1281 (2d Cir. 1973) (a suit marked by defendants' "dilatory and vexatious" tactics); $2,613,000 in *Jezarian v. Csapo*, 483 F. Supp. 385 (S.D.N.Y. 1979); over $2,600,000 in *Levin v. Mississippi River Corp.*, 377 F. Supp. 926 (S.D.N.Y.), *aff'd*, 508 F.2d 836 (2d Cir. 1974); $1,220,000 in *Percodani v. Riker-Maxson Corp.*, 1971-72 Tr. Binder, Fed. Sec. L. Rep. ¶93,337 (S.D.N.Y. 1972); $2,420,000 in *Ripley v. Int'l R.R. of Central America*, 16 A.D. 2d 260, 227 N.Y.S.2d 64 *aff'd*, 12 N.Y.2d 814, 187 N.E. 2d 131, 236 N.Y.S.2d 64 (1962) (state court action); and $1,250,000 in *Zenn v. Enzaloni*, 46 Misc. 2d 378, 259 N.Y.S. 2d 747 (1965) (also a state action).

[46] Section 330 (a) (1) of the Bankruptcy Code, 11 U.S.C. § 330 (a) (1), provides that reasonable compensation shall be "based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title." The legislative history explicitly reveals that the policy of the Bankruptcy Code "is to compensate attorneys and other professionals serving in a case under Title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under Title 11." Contrary language in the Senate Report accompanying S. 2266 was rejected and overruled. Congress also said that "Notions of economy of the estate in fixing fees are outdated and have no place in Bankruptcy Code." See 124 Cong. Rec. H 11,091-2 (Sept. 28, 1978); S.17408 (October 6, 1978).

[47] 11 U.S.C § 1 *et seq.* ("Bankruptcy Code").

[48] *Attorney Fee Awards in Antitrust and Securities Class Actions*, 6 Class Action Reports 82 (1980).

[49] *Id.* at 121. *See also* National Law Journal, Feb. 27, 1984 at 25-36 for a more recent survey. The average hourly rate for partners in anti-trust cases was $159, with a high of $238.

[50] A survey was made of cases reported in the various services, including Bankruptcy, Anti-trust, and Securities cases. Although it was not always possible to determine hourly rates, it is clear that fees in such cases, whether measured by total amount awarded or by hourly rate, were significantly higher than those in civil rights cases. See n. 51 and accompanying text. *See Vulcan Soc'y v. Fire Dept.*, 533 F. Supp. 1054, 1059 (S.D.N.Y. 1982) (defendant objected to hourly rate of $80-$110 in Title VII cases; court noted that "Much higher hourly rates have been awarded in securities and antitrust litigation, although the issues there and the social utility of encouraging those suits is certainly no greater than the benefits derived from this litigation.")

[51] Schlei and Grossman *Employment Discrimination Law* (2nd Ed. 1983), pp. 1501-03, n. 61.

[52] *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2428 (1983).

[53] *Tasby v. Wright*, 550 F. Supp. 262 (N.D. Tex. 1982).

[54] That civil rights cases have become as complex and difficult as other types of federal litigation cannot be seriously disputed. Title VII fair employment cases require the exegesis of vast bodies of statistical data with lengthy battles of opposing experts. See, *e.g.*, *Vuyanich v. Republic National Bank*, 505 F. Supp. 224 (N.D. Tex. 1980) for the most dramatic example. See also Schlei and Grossman, *supra*, pp. 1286-1394, and cases cited therein. School desegregation cases, particularly in the North, involve the development of years of historical data. *See, e.g., Columbus Bd. of Edu. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Edu. v. Brinkman*, 443 U.S. 526 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). Voting rights cases similarly require statistical analysis, expert testimony and the compilation of historical data that may go back more than 100 years. *See Bolden V. City of Mobile*, 542 F. Supp.

1050 (S.D. Ala. 1982), *on remand from* 446 U.S. 55 (1980).

[55] *Vulcan Soc'y v. Fire Dept.*, 533 F. Supp. 1054 (S.D.N.Y. 1982); *Bradford v. Blum,* 507 F. Supp. 526, 531 (S.D.N.Y. 1981).

[56] *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2nd Cir. 1983). See the discussion in the text *infra* at n. 91-102.

[57] See, *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.) *cert. denied*, 449 U.S. 839 (1980); *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Walston v. School Bd. of Suffolk*, 566 F.2d 1201 (4th Cir. 1977); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 359 n. 64 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Singer v. Mahoning County Board of Mental Retardation*, 519 F.2d 748 (6th Cir. 1975); *Hairston v. R & R Apartments*, 510 F. 2d 1090, 1093 n. 3 (7th Cir. 1975); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 884 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Fountila v. Carter*, 571 F.2d 487, 496 (9th Cir. 1978); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 268 & n. 2 (10th Cir. 1975).

[58] *Beazer v. New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979); *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976).

[59] The Senate report specified the standards it intended to adopt to govern the calculation of fees:

> The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep., 94-1011 (94th Cong. 2d Sess.) at 6. Similarly, the House report adopted the *Johnson* factors, H.R. Rep., 94-1558 (94th Cong. 2d Sess.) at 8.

[60] ___U.S. ___, 52 U.S.L. Week 4377 (March 21, 1984).

[61] *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2nd Cir. 1983), *cert. den.*,___U.S. ___, 52 U.S.L.Week 3756 (April 16, 1984). The *Jones* result is inconsistent with the Supreme Court's encouragement in *Hensley v. Eckerhart*, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), and *Blum v. Stenson, supra* of negotiated fees.

[62] 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).

[63] 641 F.2d 880 (D.C. Cir. 1980) (en banc), cited at 76 L.Ed.2d at 51, n. 9.

[64] *Ibid.*

[65] 487 F.2d 161 (3d Cir. 1983).

[66] 52 U.S.L. Week at 4380-81.

[67] 488 F.2d 714 (5th Cir. 1974). The twelve *Johnson* factors are: (1) time and labor required; (2) novelty and difficulty of the questions; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by the attorney due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and the results obtained; (9) experience, reputation and ability of the attorneys; (10) undesirability of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases.

[68] S. Rep. No. 94-1011, *supra*, at 6 (1976).

[69] 64 F.R.D. at 682.

[70] *See, e.g., Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977; *King v. Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

[71] 635 F.2d 915 (1st Cir. 1980); *cf. Lamphere v. Brown Univ.*, 610 F.2d 46 (1st Cir. 1979).

[72] 495 F.2d 448 (2d Cir. 1974).

[73] *See, e.g., Cohen v. West Haven Board of Police Commissioners,* 638 F.2d 496 (2d Cir. 1980).

[74] *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136 (2d Cir. 1983).

[75] *See, e.g., Merola v. Atlantic Richfield Co.,* 515 F.2d 165 (3d Cir. 1975); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102 (3d Cir. 1976) (*en banc*) ("*Lindy II*"); *Prandini v. National Tea Co.,* 557 F.2d 1015 (3d Cir. 1977) ("*Prandini I*"); *Hughes v. Repko,* 578 F.2d 483 (3d Cir. 1978).

[76] 658 F.2d 246 (4th Cir. 1981).

[77] *See Wheeler v. Durham City Board of Educ.,* 585 F.2d 618 (4th Cir. 1978); *Barber v. Kimbrell's, Inc.,* 577 F.2d 216 (4th Cir. 1978).

[78] *Morrow v. Dillard,* 580 F.2d 1284 (5th Cir. 1978); *Knighton v. Watkins,* 616 F.2d 795 (5th Cir. 1980); *Graves v. Barnes,* 700 F.2d 220 (5th Cir. 1983).

[79] *Cooper Liquor, Inc. v. Adolph Coors Co.,* 624 F.2d 575 (5th Cir. 1980).

[80] *Graves v. Barnes,* 700 F.2d 220 (5th Cir. 1983).

[81] 611 F.2d 624 (6th Cir. 1979).

[82] *See, e.g., Muscare v. Quinn,* 614 F.2d 577 (7th Cir. 1980); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.,* 502 F.2d 1309 (7th Cir. 1974); *cert. denied,* 425 U.S. 997 (1976).

[83] *Kamberos v. GTE Automatic Electric, Inc.,* 603 F.2d 598 (7th Cir. 1979).

[84] *Cleverly v. Western Electric Co.,* 594 F.2d 638 (8th Cir. 1979); *DiSalvo v. Chamber of Commerce,* 568 F.2d 593 (8th Cir. 1978); *Grunin v. Int'l House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975).

[85] *Zoll v. Eastern Alllamakee Community School Dist.,* 588 F.2d 246, 252 (8th Cir. 1978); *accord, Crain v. City of Mountain Home, Arkansas,* 611 F.2d 726, 729-30 (8th Cir. 1979).

[86] 494 F.2d 885 (9th Cir. 1974).

[87] 526 F.2d 67 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976).

[88] *Williams v. Alioto,* 625 F.2d 845 (9th Cir. 1980), *cert. denied,* 450 U.S. 1012 (1981); *Ellis v. Cassidy,* 625 F.2d 227 (9th Cir. 1980).

[89] *See, e.g., Battle v. Anderson,* 614 F.2d 251 (10th Cir. 1980); *Francia v. White,* 594 F.2d 778 (10th Cir. 1979).

[90] *Bonner v. City of Pritchard,* 661 F.2d 1206 (11th Cir. 1981).

[91] *See* notes 78-80, and accompanying text, *supra.*

[92] 641 F.2d 880 (D.C. Cir. 1980) (*en banc*).

[93] *Copeland v. Marshall,* 594 F.2d 244 (D.C. Cir. 1978).

[94] *Copeland* I provided *no* guidance as to how a district court was to determine what was a "reasonable" profit margin. See 594 F.2d at 251-2.

[95] 641 F.2d at 896-900.

[96] *New York State Ass'n for Retarded Children v. Carey, supra.*

[97] *Blum v. Stenson,* No. 81-1374; Brief of petitioner, pp. 12, n. **; 21-29; Brief for the United States, Section II (1). Along with the New York State Bar Association, the Committee on Legal Assistance filed an amicus curiae brief in *Blum* discussing the inappropriateness of "cost-plus" at length. See Brief Amici Curiae at pp. 7-27.

[98] *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136 (2d Cir. 1983).

[99] 76 L.Ed.2d at 50.

[100] 52 U.S.L. Week at 4378-79.

[101] *Environmental Defense Fund, Inc. v. Environmental Protection Agency,* 672 F.2d 42 (D.C. Cir. 1982); *National Assoc. of Concerned Veterans v. Sec'y of Defense,* 675 F.2d 1319 (D.C. Cir. 1982); *Jordan v. U.S. Department of Justice,* 691 F.2d 514 (D.C. Cir. 1982). *Jordan,* the most recent decision, attempts to synthesize and resolve some

inconsistencies between *Environmental Defense Fund* and *National Concerned Veterans.*

[102] *Marable v. Walker*, 704 F.2d 1219 (11th Cir. 1983), and cases cited therein.

[103] *Northcross v. Bd. of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

[104] *See, e.g., Harkless v. Sweeny Independent School District*, 608 F.2d 594 (5th Cir. 1979).

[105] *Hensley v. Eckerhart, supra* at 50; *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense, supra.*

[106] 76 L. Ed.2d at 51.

[107] *Ibid.*

[108] *Ibid. See also, Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d at 1337. In that case, the Court of Appeals upheld the district court's refusal to delete as duplicative time spent by senior counsel supervising subordinates.

[109] *See, Johnson v. University College*, 706 F.2d 1205 (11th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3422 (1983).

[110] 52 U.S.L. Week at 4379, n. 11.

[111] *Nat'l Ass'n of Concerned Veterans, supra* at 1325. The vast majority of courts have looked to a firm's *normal* billing rates, and have not reduced fees because of any *pro bono* aspect of the work. *See, e.g., Copeland v. Marshall*, 641 F.2d at 883, n. 1. Thus, the suggestion of the Second Circuit in *New York Ass'n for Retarded Children* that the practice of a large firm to seek reduced rates in *pro bono* cases should affect rates to be awarded generally in § 1988 cases (711 F.2d at 1150, n. 10) has not been adopted by other courts.

[112] *Jordan v. Department of Justice*, 691 F.2d at 520-21.

[113] *Nat'l Ass'n of Concerned Veterans, supra* at 1326.

[114] *Nat'l Ass'n of Concerned Veterans, supra* at 1325.

[115] *See*, note 41, and accompanying text, *supra*. But *see Nat'l Ass'n of Concerned Veterans, supra* at 1336.

[116] *Id.* at 1325-26.

[117] *Copeland v. Marshall, supra* at 896-900.

[118] *Nat'l Ass'n of Concerned Veterans, supra* at 1329, and 1338 (Tamm, J., conc.). In *Blum* the Supreme Court held that by failing to introduce any *evidence* challenging the reasonableness of the hours requested or the facts in the affidavits of counsel the defendant "waived its right to an evidentiary hearing." 52 U.S.L. Week at 4378, n. 5.

[119] *Northcross v. Bd. of Educ.*, 611 F.2d at 637; *Marable v. Walker*, 704 F.2d at 122; *see Hensley v. Eckerhart*, 76 L.Ed. 2d at 52.

[120] *Id.* at 53.

[121] *See, e.g., Northcross v. Bd. of Educ.*, 611 F.2d at 642; *see also, Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 (5th Cir. 1980).

[122] *Hensley v. Eckerhart, supra* at 52.

[123] *Copeland v. Marshall*, 648 F.2d at 893.

[124] 52 U.S.L. Week at 4380.

[125] *Id.* at 4381.

[126] See *Vulcan Soc'y v. Fire Dept.*, 533 F. Supp. at 1054, 1065-66 (S.D.N.Y. 1982).

[127] See Rule 6, Rules Governing Procedures for Appointment of Attorneys in Pro Se Civil Actions, E.D. New York.

[128] *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (*en banc*).

[129] 52 U.S.L. Week at 4381.

[130] 641 F.2d at 892-94.

[131] *Copeland v. Marshall*, 641 F.2d at 892-93. *See also, Johnson v. University College*, 706 F.2d 1205, 1210-11 (11th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3422 (1983), in which the court held that delay in payment *must* be compensated for.

[132] 76 L.Ed.2d at 53; *Nat'l Ass'n of Concerned Veterans, supra* at 1330.

[133] *Nat'l Ass'n of Concerned Veterans, supra* at 1329.

[134] *Copeland v. Marshall, supra* at 905; *Nat'l Ass'n of Concerned Veterans, supra* at 1330.

[135] *Hensley v. Eckerhart, supra* at 64 (Brennan, J., concurring).

[136] *Marable v. Walker*, 704 F.2d at 1222.

[137] *Nat'l Ass'n of Concerned Veterans, supra* at 1330.

[138] *Id.* at 1327-30.

[139] *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981); *see also Barnes v. United States*, 678 F.2d 10, 12 (3rd Cir. 1982).

[140] *Parker v. Lewis*, 670 F.2d at 250.

[141] S. 141, 98th Cong., 1st Sess. The proposal was introduced because the issue of attorneys' fees was raised in connection with legislation designed to amend 42 U.S.C. § 1983 to modify the liability of state and local governmental defendants for violations of constitutional and civil rights. See nn. 150, 152-3, *infra*, and *Deprivation of Constitutional Rights by Municipal Officers and Employees*, Report of the Committees on Municipal Affairs and Civil Rights, The Record, May 1982, 346, 357. The discussion in the text is based on the version of the Bill at the time of the writing of this report.

[142] *Id.*, section 2(c) and (e).

[143] Opinion No. 80-94, 36 The Record 507 (1981).

[144] *See* S. 141, Section 2 generally.

[145] *See* The National Law Journal, May 31, 1983. The description in the text is based on a draft as of January 20, 1984.

[146] The proposed bill is somewhat paradoxically entitled "The Legal Fees Equity Act" presumably because it also would include a long overdue increase in Criminal Justice Act fee rates.

[147] *Compare*, the Equal Access to Justice Act, 28 U.S.C. § 2412 (d) (2) (A), which permits fees in excess of $75 to compensate for increases in the cost of living or other factors. The proposed new statute expressly exempts Equal Access cases from the absolute $75 cap as well as from other limiting provisions.

[148] There is no parallel provision allowing an *increase* in fees if the defendant has engaged in such conduct. See the discussion *infra* at nn. 157-162.

[149] *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[150] S. Bills - 584, 585, and 990; 97th Cong. 2nd Sess.

[151] *Municipal Liability Under 42 U.S.C. § 1983, Hearings Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 97th Cong., 1st Sess., pp. 593-95 (Testimony of Heinz Hink); pp. 101-103 (Statement of National Institute of Municipal Law Officers).

[152] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

[153] *Municipal Liability Under 42 U.S.C. 1983, Senate Hearings, supra* at 402. See also, N.Y. Times Dec. 14, 1983, p. A27, col. 1, "Massachusetts Battles Lawyer Over $332,441 Rights Case Fee."

[154] Senate Hearings, op. cit. at n. 149, at 624 (Statement of Charles Stephen Ralston).

[155] See text and footnotes at nn. 26-33.

[156] See "Administration Wants to Cap Fees Awarded in 'Public Interest' Suits", The Washington Post, Sept. 28, 1983, p. A5. Similar claims were made by Sen. Allen during the debates on the 1976 Act, 122 Cong. Rec. S.16448-49 (daily ed. Sept. 22, 1976). As Senators Kennedy (122 Cong. Rec. S.16449 (daily ed. Sept. 27, 1976) and Tunney (*Id.*, S.16493, daily ed. Sept. 23, 1976) noted, not a single example of such a lawyer was ever given.

[157] H. Rep. 94-1558, *supra* at 3.

[158] *See, e.g., Copeland v. Marshall,* 641 F.2d 880, 904 (D.C. Cir. 1980) (*en banc*); *Harkless v. Sweeny Indep. School District,* 608 F.2d 594 (5th Cir. 1977); *Parker v. Lewis,* 28 F.E.P. Cases 1130, 1132 (D.D.C. 1981).

[159] 641 F.2d at 904.

[160] *See Harkless v. Sweeny Indep. School District, supra,* and *Copeland v. Marshall, supra,* for two examples.

[161] *See, e.g., Parker v. Lewis,* 28 F.E.P. Cases at 1132.

[162] Another rationale for low rates to attorneys in cases against governmental agencies is that fees to plaintiffs' attorneys should be commensurate with the costs to the public of government attorneys. This is one of the main reasons advanced for the "Legal Fees Equity Act." *See also* Brief of the United States as *Amicus Curiae* in *Blum v. Stenson, supra* at 29, quoting from the dissent in *Copeland v. Marshall,* 641 F.2d at 912, n. 10. There, Judge Wilkey relied on figures from an earlier case in which the government sought fees as a prevailing defendant in amounts from $38.52 to $48.28 per hour (*Copeland v. Martinez,* 603 F.2d 981 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980). In *Martinez,* however, the only issue was the government's entitlement to fees *vel non,* not their amount. Counsel for the plaintiff there would hardly have been expected to object to the request on the ground the amounts were artifically low because, for example, the true rental value of government buildings in the open market was not calculated in. The government's argument ignores the fact that government lawyers' salaries are *net income,* whereas rates paid lawyers in private practice are *gross receipts* from which must be paid overhead, employees' salaries, and all the other expenses of running a business. Interestingly, when other governmental bodies have sought and been awarded fees in anti-trust litigation they have been calculated at market rates. See, *e.g., In re Arizona Escrow Fee Antitrust Litigation* [1982-83] Trade Cas.¶ 65,198 at 71,821 (D. Ariz. 1982) (lodestar based on rates of private bar, ranging from $80 to $125 per hour for state attorneys, multiplier of 2.0); *In re Fuel Oil Cases,* Trade Cas. [1982-83], ¶64,796 at 71,922-26 (M.D. Fla. 1982) (fees based on market rates, $55-$110 per hour for assistant attorneys general, multiplier of 2.0).

[163] S. Rep. No. 94-1011, *supra* at 3-4; *Newman v. Piggie Park Enterprises, supra.* Indeed, when the federal government itself is a defendant there are no public resources to enforce the public policy concerns expressed in the civil rights statutes. *Parker v. Califano,* 561 F.2d 320, 331 (D.C. Cir. 1977).

[164] *See supra,* n. 41.

[165] P.L. 92-261.

[166] P.L. 88-352; 42 U.S.C. §§ 2000e, et seq.

[167] 42 U.S.C. §2000e-16.

[168] 42 U.S.C. §2000e-6.

[169] *Ibid.*

[170] *See Parker v. Califano,* 561 F.2d 320, 331 (D.C. Cir. 1977).

[171] *General Tel. and Tel. Co. v. Falcon,* 457 U.S. 147 (1982). The position taken by the Department in *Falcon* was inconsistent to that taken in *amicus* briefs filed in at least three earlier cases. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Franks v. Bowman Transp. Co.,* 424 U.S. 747 (1976); *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977).

[172] *Connecticut v. Teal,* 457 U.S. 440 (1982).

[173] *See* Briefs of the United States as Amicus Curiae in *Firefighters Local Union No. 1784 v. Stotts,* U.S.S. Ct. Nos. 82-206, 82-229 (pending decision), and *Bratton v. City of Detroit,* U.S.S. Ct. No. 83-551 (*cert. denied,* 52 U.S.L.W. 3509 (Jan. 9, 1984).

[174] *United States Postal Service Board of Governors v. Aikens,* ____U.S.____, 75 L.Ed. 2d 403 (1983). In addition to employment cases before the Supreme Court, the Civil Rights Division has sought to intervene in two major cases to oppose affirma-

tive action plans adopted to correct past discrimination in the police departments of Detroit and New Orleans. *Bratton v. Detroit,* 704 F.2d 878 (6th Cir. 1983) (voluntary affirmative action plan upheld; government's motion to intervene in support of rehearing denied, rehearing denied, May 27, 1983)); *Williams v. City of New Orleans,* 694 F.2d 987 (5th Cir. 1982) (settlement including goals and timetables approved on appeal; government's motion to intervene in support of rehearing granted, rehearing *en banc* granted Feb. 14, 1983)). In the Detroit case the Sixth Circuit noted the government's change in position from a prior case in which it supported the same plan. *Detroit Police Officers' Ass'n v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981). In the New Orleans case, the Department blocked the filing of an *amicus* brief by the EEOC in favor of the settlement.

[175] *Bob Jones University v. United States,* ____ U.S. ____, 76 L.Ed. 2d 157 (1983). The Civil Rights Division has also unsuccessfully urged the Supreme Court to reconsider its approval, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971), of the use of busing as a device to remedy segregation in the public schools, *Bd. of Educ. v. Kelley,* ____U.S. ____, 74 L.Ed.2d 1027 (1983) (denying certiorari), and took the position that the voluntary desegregation plan put into effect by the City of Seattle should be set aside by a state statute. *Washington v. Seattle School Dist. No. 1,* 73 L.Ed.2d 896 (1982). And for the first time since the Voting Rights Act was passed in 1965, federal district courts have struck down state reapportionment plans that had been approved by the Department of Justice. Both cases were brought by private parties supported by a public interest organization. *Major v. Treen,* 574 F. Supp. 325 (E.D. La. 1983) (3-judge court); *Gingles v. Edmisten* (E.D.N.C. C.A. No. 81-803- Civ.-5, Jan. 27, 1984) (3-judge court).

[176] See, *Vulcan Soc'y v. Fire Dept.,* 533 F. Supp. 1054, 1065-66, (S.D.N.Y. 1982).

[177] For example, the NAACP Legal Defense and Educational Fund, Inc., one of the largest public interest legal organizations in the country, has only 23 attorneys on its staff. *Hearings Before the Subcommittee on the Constitution of the Senate Judiciary Committee,* 97th Cong., 1st Sess., on S.584, S.585, and S.990, pp. 623-24.

[178] *James v. Stockham Valves and Fittings Co.,* 559 F.2d 310, 358-59 (5th Cir. 1977); see also, *Parker v. Lewis,* 670 F.2d 249 (D.C. Cir. 1982).

[179] See *Vulcan Soc'y v. Fire Dept.,* 533 F. Supp. at 1066.

[180] *Northcross v. Bd. of Educ.,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

[181] See Rules Governing Procedures for Appointment of Attorneys in Pro Se Civil Actions, E.D. New York, May, 1982.

[182] Letter Memorandum to Members of the Bar from Hon. John Feikens, Chief Judge, United States District Court for the Eastern District of Michigan (Undated [1983].)

ACLU

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

E. Richard Larson
STAFF COUNSEL

September 19, 1984

Senator Orrin Hatch
Subcommittee on the Constitution
of the Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Comments of E. Richard Larson on behalf of the American Civil Liberties Union, on S. 2802, the "Legal Fees Equity Act"

Dear Senator Hatch:

This letter is in response to various provisions of S. 2802, titled the "Legal Fees Equity Act." This also is in response to the prepared statement of Arkansas Attorney General Steve Clark submitted to your Subcommittee on the Constitution during the hearing held on September 11, 1984.

It is my understanding that the hearing record on S. 2802 is open for supplementation until September 21, 1984. I respectfully request that this letter be made a part of the formal hearing record.

I. COMMENTS ON VARIOUS PROVISIONS OF S. 2802

One of the purported rationales for S. 2802 is that the bill simply will provide "guidance," where none now exists, for awarding statutorily authorized attorneys fees to parties who prevail against government defendants. The fallacy of this purported rationale is patent.

First, it is beyond peradventure that the 96th Congress, which enacted the Civil Rights Attorney's Fees Awards Act of 1976 [42 U.S.C. § 1988] provided extensive legislative guidance particularly through the accompanying Senate and House Reports. See

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908-14; and H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976), reprinted in E. Larson, Federal Court Awards of Attorney's Fees 288-312 (1981).

Second, it is also beyond doubt that the courts have followed this legislative guidance in interpreting and applying statutory authorizations of attorneys fees. See, e.g., Pulliam v. Allen, 80 L.Ed.2d 565 (1984) (no judicial immunity from fees); Blum v. Stenson, 79 L.Ed.2d 891 (1984) (fees awarded according to market rates); Hensley v. Eckerhart, 76 L.Ed.2d 40 (1983) (fees awarded for time spent on winning claims); Maher v. Gagne, 448 U.S. 122 (1980) (plaintiffs who prevail through settlements are entitled to fees); Hutto v. Finney, 437 U.S. 678 (1978) (no 11th Amendment immunity from fees). Of equal import is the fact that the courts have followed the 96th Congress' legislative guidance in providing a common interpretation of similarly worded fee-shifting statutes. See, e.g., Hensley v. Eckerhart, 76 L.Ed.2d at 50 n.7 ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'"); New York Gaslight Club, Inc. v. Carey, 447 U.S. 50, 70-71 n.9 (1980) (interpretation of the fee authorization in Title VII based on the legislative history of the 1976 Fees Act).

The fact of the matter is that S. 2802 is not at all intended to provide guidance where none now exists. Instead, S. 2802 is quite blatantly intended to contravene the guidance and purposes of the 96th Congress by reducing and denying fees to counsel for prevailing plaintiffs. A possibly unintended effect of S. 2802 would be increased litigation over fees by losing defendants, who not incidentally were the losing appellants in all of the foregoing cases. Each of these matters is addressed briefly hereafter.

A. S. 2802 Would Have the Intended Effect of Contravening the Purposes of the 96th Congress by Reducing and Denying Fees to Counsel for Prevailing Plaintiffs

Congress' frequent enactment of fee-shifting statutes has been for the obvious purpose of encouraging lawyers to represent plaintiffs in lawsuits that provide private enforcement of laws enacted by Congress. Nowhere has this congressional purpose been more clearly and frequently stated than in the legislative history accompanying the Civil Rights Attorney's Fees Act of 1976. For example, "fee awards are essential if the Federal statutes to which [the Fees Act] applies are to be fully enforced." S. Rep. No. 1011 at 5 (emphasis added). With reference to our "civil rights laws," full "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." Id. at 2 (emphasis added). "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enfore, we must maintain the traditionally effective remedy of fee shifting in these cases." H.R. Rep. No. 1558 at 6 (emphasis added).

S. 2802, by effecting an across-the-board partial repeal of the traditionally effective remedy of fee shifting, would reduce and in many instances deny altogether the essential remedy of fee awards.

For example, § 5(1) makes a plaintiff eligible for fees only if the plaintiff has "prevailed on the merits," and § 3(9) limits that quoted phrase to a prevailing plaintiff who has "obtained significant relief." These limitations contravene the guidance provided by the 96th Congress and similarly contravene the Supreme Court's application of that guidance in Hensley v. Eckerhart, 76 L.Ed.2d 40, 50 (1983) (plaintiffs who obtain "some of the benefit the parties sought in bringing suit" are prevailing parties entitled to fees). The intentional effect of this proposed alteration of the current standard would be to make masses of prevailing plaintiffs ineligible to receive fees.

In fact, all of the subsections of § 5, which sets forth additional eligibility criteria, would have the intended effect of making prevailing plaintiffs ineligible to receive fees. No such eligibility criteria were ever established by the 96th Congress and there is no analogy at all under current law.

For those prevailing plaintiffs fortunate enough to be determined eligible for fees under the proposed § 5 hurdles, barriers to a full award of fees are proposed in § 6.

First, § 6(a)(1) would place an absolute ceiling on hourly rates of $75 per hour. Not only is there no analogy for such a limitation where private parties are the enforcers of federal rights against losing government defendants, but this absolute ceiling contravenes the 96th Congress' intent that market rates are to govern, and similarly contravenes the Supreme Court's application of that guidance in Blum v. Stenson, 79 L.Ed.2d 891 (1984).

Second, § 6(a)(2) would appear to bar upward adjustments of the hours-times-rates lodestar. This too defies the guidance of the 96th Congress and contravenes the application of that guidance in Blum.

Third, §§ 6(b)(1)-(6) uniquely would allow the reduction or even total denial of fees under any of six new criteria. These proposed statutory authorizations for fee reduction and fee denial fly in the face of Congress' previously stated intent.

Finally, § 6(c) would have the remarkable effect of using whatever fee award might ultimately be recovered from government defendants by plaintiffs' counsel in the collateral proceeding on fees to offset the amount of a monetary judgment won for the plaintiffs themselves from a jury or a judge. This too defies Congress' consistent overall intent in enacting fee-shifting legislation, the very purpose of which is to shift the payment of able enforcer of federal rights.

It is unlikely that many prevailing plaintiffs would survive a run down this proposed legislative gauntlet. It accordingly is highly unlikely that lawyers, who after all earn a living based on the fees they receive, would be attracted to represent potential plaintiffs whose federal rights have been violated by government agencies and officials.

B. S. 2802 Would Increase Litigation Over Fees By Losing Defendants

The Supreme Court has now twice stated that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 76 L.Ed.2d at 53, quoted with approval in Blum v. Stenson, 79 L.Ed.2d at 904 n.19. Yet, given the resistance of government defendants to paying fees (as illustrated through the losing arguments advanced by the losing government defendants-petitioners in Blum, Hensley, Pulliam, Maher, Hutto and so many other major litigations over fees), an additional effect of S. 2802 would be to encourage only more litigation by losing government defendants in opposition to the payment of fees to prevailing plaintiffs.

With extensive guidance as to fee entitlement and as to fee computation having been provided by Congress eight years ago, and with eight years of judicial application of that congressional guidance, attorneys fees law today is becoming not unlike a detailed Code of Federal Regulations. New legislation with new standards -- such as S. 2802 -- would necessarily unsettle that which has been settled and would in turn lead to a new wave of litigation over fees. This of course is especially true about S. 2802 since the new standards which strongly favor nonpayment of fees by losing government defendants a fortiori would encourage those very losing government defendants to try to win through litigation their new nonpayment windfall.

This general invitation to losing government defendants to engage in increased fee litigation would in fact be very difficult for the losing government defendants to refuse in view of the subjective wording used in S. 2802 and particularly in view of the proferred opportunities to escape liability for all fees.

As noted earlier, § 5(1) would allow fees only to a prevailing plaintiff who has "prevailed on the merits," and § 3(9) limits that phrase to a prevailing plaintiff who has "obtained significant relief" (emphasis added). But what is significant relief? And from whose perspective, the plaintiffs' or the losing defendants' perspective? This truly would be a generous invitation to major litigation.

A similar subjective wording problem is found in § 8(2) which bars an award of fees even in injunctive suits subsequent to a declined offer of settlement if the relief ultimately obtained is "not more favorable" than the offer, and if the refusal to accept the offer is deemed to have been "not reasonable at the time." Since these quoted phrases would be subject to widely different interpretations, and since a losing government defendant who persuades a court of the correctness of its interpretation would be able to escape fee liability, S. 2802 again would simply extend a generous invitation to losing government defendants to engage in second major litigation.

The primary invitation to losing government defendants to engage in second major litigations over fees, however, arises from §§ 6(b)(1)-(6), which authorize a discretionary reduction or total denial of fees flowing from the arguable presence of six new criteria. Just as the losing government defendants have argued (unsuccessfully) in hundreds upon hundreds of second major litigations before trial courts and on appeal that there were present special circumstances which should render an award of fees unjust, so too would losing government defendants argue for fee denial or at least fee reduction under the six new discretionary criteria in §§ 6(b)(1)-(6).

S. 2802, in sum, contravenes previous congressional intent, unsettles congressional guidance and settled law, and invites a deluge of second major litigations over fees. Its enactment would be a disaster for enforement of federal law and a disaster for the courts.

II. RESPONSE TO THE STATEMENT OF ATTORNEY GENERAL STEVE CLARK

In his prepared statement submitted during the hearing held on September 11, 1984, Arkansas Attorney General Steve Clark based his support for S. 2802 on a single lawsuit which he contends is "illustrative of the way some civil rights cases have become boondoggles for plaintiff [sic] lawyers and impose unfair burdens upon the states." The example chosen by Mr. Clark, alas, is instead illustrative of the frivolous litigation tactics sometimes taken by losing government defendants in a second major litigation to avoid the judgment day of finally having to pay fees. In any event, it is because of the fact that Mr. Clark's prepared statement submitted to this Subcommittee is so full of mischaracterizations, half-truths, and untruths, that I feel compelled to respond.

The example chosen by Mr. Clark is a case in which plaintiffs (represented primarily by ACLU volunteer lawyers) challenged the constitutionality of the Arkansas creationism statute. The merits decision, in which plaintiffs won the entirety of the relief sought, is reported as McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982). The trial court's decision awarding fees, rendered a year later on January 21, 1983, is unreported. The Eighth Circuit's affirmance of the fee award, rendered nearly a year later, is reported as McLean v. Arkansas Board of Education, 723 F.2d 45 (8th Cir. 1983).

1. Referring to one of plaintiffs' local Little Rock counsel, Mr. Clark states that, "We in Arkansas proudly consider him to be one of the leading civil rights attorneys in the country." What Mr. Clark does not reveal is that the losing government defendants argued that this outstanding lawyer, who spent the better part of a year on this litigation, should be awarded no fees whatsoever; that defendants harassed this lawyer by seeking from him in discovery "all fee statements" submitted by him to all clients for any work performed during 1981; and that defen-

dants' resistance to fee liability through a second major litigation caused an additional two-year delay in payment to this civil rights lawyer who practices in a small office with only several other lawyers.

2. Mr. Clark maintains that the lead counsel role was not shared by a Little Rock lawyer and an ACLU lawyer but instead that a private "New York firm's lawyers became lead counsel." He is dead wrong.

3. Mr. Clark maintains that "plaintiffs spared no expense calling upon the preeminent scientists and theologians of the world to support their cause." In fact, our expert witnesses (not drawn worldwide) never charged us any fees, and we of course never sought to recover as expenses from the losing defendants any expert witness fees.

4. In the immediately succeeding sentence, Mr. Clark states that "Depositions were taken all over the country requiring extensive travel." He omits to explain that our witness list was quite short but that defendants listed as trial witnesses 57 people who lived all over the country. Ultimately, as defendants narrowed their list somewhat, 49 depositions had to be taken.

5. As to our fee request, Mr. Clark states that "Plaintiffs requested New York rates for all the lawyers in the case." To the contrary, plaintiffs' fee motion expressly states that "although plaintiffs are entitled to claim higher New York rates" for their New York counsel, "all plaintiffs' counsel seek fees at Arkansas rates." There never was any doubt about this voluntarily limited hourly rate request in the plaintiffs' lawyers' affidavits, in the supporting affidavits filed by other Little Rock lawyers (documenting their 30-day billing litigation rates as higher than the Little Rock rates sought by plaintiffs' counsel), in the briefs, or in the court opinions.

6. Mr. Clark indicates that the government defendants objected to the fee request, but he does not explain that the primary grounds alleged were that plaintiffs' lawyers were enti-

tled to no fees whatsoever. Among the losing government defendants' contentions was the unbelievable argument that plaintiffs were not the prevailing parties, and various arguments about the existence of special circumstances which should render an award of fees unjust. Even after the trial court rejected these arguments out of hand based on overwhelming congressional intent and judicial precedent, defendants' appeal focused again primarily on their arguments that plaintiffs' lawyers should have been awarded absolutely no fees (i.e., the bulk of the losing government defendants' 55-page appeal brief argued against fee liability while less than 2 pages were devoted to contesting the amount awarded). The court of appeals rejected defendants' half-dozen such arguments in a single sentence.

7. Returning to hourly rates, Mr. Clark submits that the trial judge "knew the billing rates of the best Little Rock lawyers, and applied that rate, rather than the New York rate, to the fee request of the plaintiffs." In fact -- to reiterate -- there never was any such issue about New York rates since plaintiffs' counsel never sought New York rates but instead sought only Little Rock rates.

8. Referring to the trial judge's fee decision, Mr. Clark states that the judge "noted that he was very familiar with the Little Rock Bar and that he knew plaintiffs' [sic] could have found local counsel to represent them at much less cost than was actually expended." Plaintiffs, however, were represented by local counsel (who, like plaintiffs' other counsel, had to wait more than two years after resolution of the merits to receive their fees). Beyond this, there is nothing in the trial court's decision or in the entire record to suggest that additional local lawyers were available to provide unpaid, nearly full-time representation. In fact, there were none.

9. Mr. Clark finally alleges that "during the hearing on fees, the judge called the plaintiffs' attorneys to task for not moving for a summary judgment before trial." This seems a bit of

a mischaracterization of the judge's actual question to one of plaintiffs' lawyers: "why didn't you file a motion for summary judgment in this case?" The answer was obvious: given the disputed factual issues in the case (the trial judge frequently characterized the case as "factually complex"), summary judgment was improper; had the motion been erroneously granted, the judgment would have been reversed on appeal. In either event, the case would not have been resolved and valuable time would have lost. From defendants' perspective at the time, such a summary judgment motion would have been characterized (probably correctly) as frivolous.

Although there are additional inaccuracies in Mr. Clark's statement, the fact of the matter is that the Arkansas Legislature enacted a statute which was held to be unconstitutional under the First Amendment, and that the losing government defendants accordingly were liable for fees. It is unfortunate, at the very least, that Mr. Clark mischaracterized this litigation in an effort to provide support for S. 2802. It provides no such support.

III. CONCLUSION

S. 2802 is not a good idea and it most certainly would not be a good law. Full fee awards continue to be essential if the Constitution and the laws enacted by Congress are not to become hollow pronouncements.

Sincerely,

E. Richard Larson

E. Richard Larson

ERL:ln

PREPARED STATEMENT OF J. H. MCQUISTON

Mr Chairman and Members of the Committee:

McQuiston Associates is a "think tank" which has existed for almost 25 years. Continuously for over two years, the staff has almost exclusively examined the subject matter addressed in S.81 & S.141. I believe McQuiston Associates is almost without an equal in this field, and certainly counting those whose knowledge has been offered to this Committee.

With that background, I respectfully submit that the legislation as proposed in these two bills will serve no need whatsoever. In fact, the bills may even encourage scofflaws, who might then try to ignore the constitution and laws of the United States.

Accordingly, I believe it would be unwise and unjust for Congress to enact either bill. Nevertheless, if this Committee proposes to "adjust" either Section 1979 or 722 of the Revised Statutes, I would propose the specific language herein described in the "amendments" sections.

Courts often say that it is less important for them to interpret the law perfectly than it is for them to interpret it clearly. Inasmuch as all courts including the Supreme Court have clearly interpreted the subject matter proposed in the two bills, I believe Congress should not re-address the issues unless it is upset with the Court's interpretations, because a re-addressment will unsettle the law and escalate the cost of litigations touched by the law. I see nothing in either bill that would warrant so harmful a move by Congress.

SECTION 1

Section 1 of S.141 will only apply to a governmental agency that a court has already determined is a proper party to litigation of the case-in-chief. Moreover, the court will already have determined that the agency did violate someone's substantive civil rights.

Section 1 erroneously implies that employee-agents who may have been prosecuted along with the agencies will be somehow immunized on account of the doctrine of respondeat superior; but that is not true. See, e.g, Parratt v Taylor, 451 U.S. 527, n.3 (1981). As the Supreme Court said in Smith v Wade, 51 LW 4409 (1983):

> "[I]ndividual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants. * * [W]e have had occasion * * * to make clear our view that they are available; indeed, we have rested decisions on related questions on the premise of such availability.[5]
>
> ---
>
> "Note 5: [F]or example, we held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under §1983. A significant part of our reasoning was that deterrence of constitutional violations would be adequately accomplished by allowing punitive damage awards directly against the responsible individuals.
>
> "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. * * *
>
> "Similarly, * * * we stated that punitive damages would be available in an action against federal officials * * * partly on the reasoning that since such damages are available under §1983, it would be anomalous to allow punitive awards against state officers but not federal ones."

And, in note 11 it said:

> "[T]he issue was whether a corporation could be liable in punitive damages for the tort of its employee. The Court, reasoning largely from general principles of respondeat superior, held that such vicarious liability could exist only when the employer had authorized or ratified the tort."

Governmental agencies, more than any others, are supposed to know the constitutional requirements. That concept is well settled. Agencies are supposed to instruct their employees accordingly. Presently, courts will apportion the damages and fees between the agency and employee, as is appropriate to the situation. See, e.g, Smith v Wade; People Organized v Thompson, et al, 559 F Supp 54 (N.D.Ill 1983).

To have been held liable by the court, under respondeat superior, the agency must have authorized the employee's misconduct. Furthermore, the misconduct must have violated an individual's substantive right, or else the court would have declined jurisdiction, under the Parratt doctrine. After conviction, to permit an agency (but not an employee or private person) to evade the punishment given to all other civil-rights violators, under the theory of S.141 that only an agency has the privilege to remain ignorant of the rights of its citizenry, would totally subvert the raison d'etre for Sections 1979 and 722. Surely, no thinking American would permit such conduct from our elected spokesmen.

Courts long have recognized the injustice if a losing civil-rights defendant could evade retribution by pleading "ignorance of the law". And, if an injured party has weathered the "chilling effect" of having to "fight city hall", and has proved a civil-rights violation, surely the Federal Government should not "coddle" the violator in any way. To the contrary, the Federal Government should help the injured party. And if there were no relief available in a successful civil-rights suit, then there would be no deterrence for the violator, especially an organization like an agency.

The proposed section (b) totally abandons these principles. Agencies will be freed to commit even more sophisticated violations and thereafter plead "good faith", hoping to evade all penalty even if they are caught and convicted. Moreover, the cost to the injured party will escalate, because it will require more inquiry, at every phase of the litigation, just to obtain any compensatory relief from the violator. At that rate, the proposed section will conceivably cost the violator more than the prior statute.

Moreover, S.141 failed to specify what, how much, and whose "good faith" will entitle: (1) the violator to be "forgiven", and (2) the violator to take advantage thereby of the victim.

Inherent in the approach is the notion that a civil-rights action costs the litigants nothing. If that were true, federal courts would not be awarding the sums they do, nor would defendant's attorneys be collecting the fees they do. Ruiz v Estelle, 553 F Supp 567 (1982) at 584-586 noted how massive the expense can be for both sides in an action, whenever the loser resists in force; Ruiz noted that in seven months the defendants spent as much, in outside attorney-time alone, as the successful plaintiff spent in eight years. Truly, it would be hard to find "good faith" in such "massive retaliation" by a violating agency.

However, in his explanation of S.81 & S.141 (Cong. Rec. S 628 - S 635, Jan 26, 1983), the Chairman did not say whether the determinative "good faith" was that of defending the action or of perpetrating the violation, or both. In a parallel statute, EAJA (P.L.96-481), a similar apparent ambiguity has unleashed a massive amount of litigation just to clarify the determining-point itself.

Assuming that the violator's state of mind in committing the violation is also of importance, then the violator's organizational structure is arguably relevant to the issue. Agencies are composed of many employees, each having assorted motivations and assignments, none of which being crystal clear and unanimous. Therefore, an inquiry into the "good faith" of any agency might become hopelessly complicated by the sheer complexity of bureaucratese. It could, most certainly, dwarf the case-in-chief.

Corenevsky & Titsworth

At S 631, Jan 26, 1983, the Chairman said:

> "Furthermore, the doctrine of separation of powers provides that some Government decisions should be insulated from review by the courts. A costly damage judgment or court-ordered spending, where officials have acted in good faith, represents a needless intrusion into municipal decision making."

After Robert Corenevsky was charged with first-degree murder in El Centro, California (a small farming town), a public defender was assigned to defend him. A proper defense required expending $13,314 to prepare it. But when the judge ordered the county to legislate the appropriation, the supervisors refused, citing a budget deficit.

David Titsworth, the county auditor, was subsequently jailed for nonpayment (in the jail infirmary because of his stomach problem) when the supervisors refused to pay. Supervisor Bucher, a former justice of the peace, said:

> "For the courts to make the legislative branch do their bidding is a bunch of b.s. The whole point of this is that the Constitution says we have three separate branches of government -- none supreme over the other. So I'm going to hold my ground. I want to force this issue."

Corenevsky may spawn a host of §1983 actions. By what yardstick will this Committee measure the "good faith" of the various officials in this action?

Los Angeles PDID

The City of Los Angeles employs about 5,000 policemen, who with their families would populate an entire town the size of El Centro. The ACLU charged that the Police Department's Public Disorder and Intelligence Division (PDID), supposed to be watching organized crime, was actually just spying on ordinary people like a "gestapo" police-state would. Apparently, the ACLU was correct. Voluminous files of contraband "snooping", recovered using the City's FOIA and because one PDID member was contrite, revealed data such as the sexual activities of law-abiding citizens, and surveillance of the City Council.

Files contained materials regarding the Mayor (a retired police lieutenant), judges, councilmen and commissioners, and other upstanding persons and miscellaneous civic groups. Now, it was learned that high-ranking police supervision warned underlings to secrete the files whenever the Police Commission was due to make an on-site inspection. The Commission is an outside group of civilians that is responsible for setting policy for the Department, but it has little or no control over the Police Chief.

After the suit disclosed the violations, one City Councilman charged with Police oversight reacted as indicated by the published letters below (and reprinted with express permission):

Los Angeles Times

imes

Police Department Intelligence Work

In a letter to The Times ("Police Department Intelligence Work," April 1), Los Angeles Police Commissioner Maxwell Greenberg stated, "My principal difficulty with the PDID (Public Disorder Intelligence Division) litigation lies in the inordinate amount of time that has been required to deal with it . . . . PDID represents a minuscule part of the Los Angeles Police Department and its law-enforcement efforts. Why should it preempt attention away from more important matters?"

While I greatly respect Greenberg, I must take issue with him on this subject. The lawsuits which have been filed are not frivolous. Serious charges that the intelligence division compiled financial and medical information on *law-abiding* citizens, harassed and disrupted the lives of others and kept files on the mayor, several police commissioners, a judge and several members of the City Council are under investigation by the grand jury, the district attorney and the Police Department itself. Certainly, those who were victims of the alleged abuses have the right to redress their grievances through our courts.

There are, however, some questions which should be troubling the five police commissioners: Why was the Police Department spending the taxpayers' money to gather information on law-abiding citizens? What did it need this information for? What did it use it for? Who ordered it compiled? Why was it allowed to go unchecked for so long? And why was the department allowed to lead policymakers around by the nose, successfully keeping from them the true nature of the division's activities?

The judicial process will indeed determine whether the plaintiffs are wasting our time, or whether the city was wasting the taxpayers' money in monitoring the private lives of *law-abiding* citizens. While the intelligence division is a small part of the Police Department's overall operations, the consequences of its transgressions to the city far outweigh its percentage of the LAPD budget. The city's financial exposure in this case alone could be in the tens of millions of dollars.

Our Constitution protects the right of Americans to speak freely, even if what they say is not popular. While I do not share the political philosophies of most of the plaintiffs in this case, it is my duty to defend their right to speak. Any city employee who does any less has violated his oath to uphold the Constitution of the United States. Clearly, such a violation should command an "inordinate" amount of our time and attention, and that's why the Public Disorder Intelligence Division cases do just that.

Some of these plaintiffs have been warning for years that the division was overstepping its bounds, and no one listened—not the City Council and not the Police Commission. Don't blame the messenger for getting us into this mess. If we're searching for fault, we'll find it with ourselves for not having opened our eyes sooner.

ZEV YAROSLAVSKY
Councilman, Fifth District

'Vigilantism by Computer'

I am writing to applaud your editorial (May 26), "Vigilantism by Computer." Revelations of past months and years show that the private lives of public officials and citizens have been the object of the Police Department's personal curiosity.

Now we learn that the same detective under investigation for carting off thousands of files to his home garage to circumvent city policy also ran a computer operation for Western Goals, a "clearinghouse" for certain police departments that have been barred from keeping political information on law-abiding citizens.

So, while city policy-makers have been cracking down on the Los Angeles Police Department's political snooping, one detective—with the apparent approval of his superiors—has been funneling information into the computer of a private foundation that doesn't have to answer to the public the way a city agency must. Isn't this a convenient arrangement for those who would prefer to circumvent scrutiny and established codes of behavior?

The police chief's monotonous tune that there have been no abuses in his surveillance unit at best is a broken record. At worst it is a slap in the face to the Board of Police Commissioners, which has abolished the Public Disorder Intelligence Division in the wake of these scandals, and to the mayor and those City Council members who want to see a local freedom-of-information law on the books.

The news of a computer tie-in with Western Goals broadens the scope of this scandal further than ever. Will the public ever know the full truth? Or will we continue to go from week to week waiting for yet another shoe to drop?

ZEV YAROSLAVSKY
Councilman
Fifth District
Los Angeles

After the ACLU exposed the files, the City Council ordered the Police Chief to disband the PDID. But as the Councilman indicated, the liability under §1983 may reach tens of millions of dollars.

Nevertheless, while respondeat superior has been tacitly admitted in this case, the "bad faith" was apparently not the fault of the City Council, which by charter is really the "executive" of the city as well as its legislative body.

By what yardstick would this Committee measure the "good faith" of the various officials in this action?

Amendment to S.141 Sec.1

As an alternative to Section 1, I respectfully submit the following language to be added to Section 1979 of the Revised Statutes. This language will minimize litigation:

> "(b)(1) A suitable proceeding for administrative redress, if available and providing a complete remedy, is to be the preferred method of determining compensation. No vicarious liability by any agency shall be presumed in any action pursuant to this section.
>
> "(2) To receive an award under this section, prior to filing suit a prevailing plaintiff must have given notice of the alleged injury to the losing party; and a suitable time thereafter, to enable the losing party to effect a cure thereof, must have elapsed before the suit was filed, or else the award may be adjusted to compensate therefor at the discretion of the court."

SECTION 2

Section 2 is either redundant or else disruptive of current judicial practice, inasmuch as every material issue addressed in Section 2 has already been implemented by the courts. Either Rule 68, F.R.Civ.P, or other well-established and non-controversial conventions, control those procedures. Therefore, Section 2 can only act to unsettle the procedures and escalate the expenses of the parties.

Moreover, and with all due respect, the Chairman's commentary of Jan 26, 1983, assumed a naivete of process that simply doesn't exist any more in courts. See, e.g, Ruiz v Estelle.

Long before the Civil Rights Attorney's Fees Awards Act of 1976, the Supreme Court in Newman v Piggie Park, 390 U.S. 400 (1968), said:

> "If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons."

The Court's comment was reprised in Christiansburg v E.E.O.C, 434 U.S. 412, 417 (1978), where also at 422 an award was made appropriate against a losing plaintiff for those reasons ("needless to say").

Section 722A(a)

By being over-specific, Sec 722A(a) would restrict the existing discretion of the courts, because it is not all-inclusive. By thus intruding into settled law, the courts will have to re-interpret their powers.

In I.N.S. v Chadha, 51 LW at 4923 n.11, Justice White noted that such Congressional "restatement" of settled practice would indicate disfavor with the status quo:

> "The silence of Congress after consideration of a practice * * * may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked. * * * By contrast, the exercise [of legislation] is an unmistakable indication that the * * * decision at issue is disfavored." (emphasis added)

If section (a) is enacted, hordes of lawyers will commence arguing over which part of the contemporary standard cannot thereafter be enforced by the courts. I believe that would be most unsatisfactory. I urge this Committee to delete the proposed section (a) from this bill.

Section 722A(b)

This section will require courts to maintain litigation beyond the former decision, simply to try a "hypothetical" case which could be very lengthy. It proposes to reverse the ancient doctrine of "judicial economy".

No issue may be presented to a federal court unless the court has jurisdiction to decide what is an active "case or controversy". Art III, Const. See, e.g, Kimbrough v A.A.A, 574 F2d 423 (1978). While "the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits -- an inquiry that cannot even commence until one party has 'prevailed'," White v N.H. Dept of Empl Security, 455 U.S. 445 (1982), "a request for attorney's fees should not result in a second major litigation". Hensley v Eckerhart, 51 LW 4552, 4555 (1983).

To join a pendent claim to one eligible under §1988, the court must have accepted the case-in-chief as containing a valid pendent claim. Thereafter, bifurcation is to be shunned by the court, because pendent jurisdiction "conserves judicial energy and avoids multiplicity of litigation." See Rosado v Wyman, 397 U.S. 397, 405 (1970).

The proposed section (b) encourages *bifurcated* actions, because they will in all respects become more easily eligible for the *third* litigation over attorney fees. Such a section would add to the congestion in the courts.

The reason why courts avoid constitutional issues is to exercise "judicial economy". However, if Congress will now force every court to decide *every* case on a constitutional basis, per S.81 & S.141, then the advantage of pendency will be lost. Injured parties will simply *file more actions* because of this bill.

The additional process required because of the change in judicial practice by the bills will *drastically escalate* the losing party's expenses, both for its defense and for its payment to the prevailing party. Therefore, S.81 & S.141 will fail *completely*, if the purpose is to reduce expenses.

I urge this Committee to reject this section (b) in its entirety.

Section 722A(c)

This section duplicates Rule 68, F.R.Civ.P. See, e.g, *Chesney v Marek*, 547 F Supp 542 (1982). Moreover, "continuing to litigate after it becomes unreasonable to do so" is actually an element of "bad faith" calling for punitive damages. Therefore, this section (c) is redundant several times over. I urge this Committee to help to simplify the statutes by omitting this section.

Section 722A(d)

Nadeau v Helgemoe, 581 F2d 275 (1978), was recently re-affirmed as the Supreme Court's choice on how to treat the subject matter of this section. See *Hensley v Eckerhart* at 4554. Further Congressional modification will only unsettle the subject.

Examples of such decisions in the various circuits, dealing with mootness by "legislation", include:

Maher v Gagne, 448 U.S. 122 (1980); *Coalition v King*, 691 F2d 597 (1 Cir 1982); *COYOTE v Roberts*, 523 F Supp 352 (1981); *Ross v Horn*, 598 F2d 1312 (3 Cir 1979); *Demier v Gondles*, 676 F2d 92 (4 Cir 1982); *Comm'r's Court v U.S*, 683 F2d 435 (DC Cir 1982); *Robinson v Kimbrough*, 652 F2d 458 (5 Cir 1981); *Harrington v DeVito*, 656 F2d 264 (7 Cir 1981); *Am. Constitutional Party v Munro*, 650 F2d 184 (9 Cir 1981); *Williams v City of Fairburn*, 702 F2d 973 (11 Cir 1983).

Nevertheless, section (d) will *restrict* the discretion the court now has, regarding such cases. Such a change will only lead to *another* round of litigation in all the circuits, just to decide what the *new* law means. I urge this Committee to reject this proposed section.

Section 722A(e)

Section (e) abandons the old Congressional standard regarding whether the fee is reasonable or clearly excessive. That standard, per P.L.94-559, was Disciplinary Rule DR2-106 of the ABA:

> "(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> "(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following etc ."

Standard DR2-106 was acknowledged not only by Congress but also by every court and circuit in the United States. See, e.g, S. Rep 94-1011, p.6; Ruiz; Johnson v Georgia Highway Express, 488 F2d 714 (1974); Hensley v Eckerhart.

The standard of section (e) is invalid in every circuit presently. Moreover, the Chairman in his explanation contradicted his express prohibition against multipliers, by suggesting that multipliers should be hidden within the rate schedule. By applying hidden multipliers for at least (1) inflation (or delay) and (2) contingency, he would open the door to constant litigation; yet he also said:

> " The contingent multiplier rationale some courts are applying is clearly harmful to State and local governments."

Mathematically, a 10-year old case, based on prevailing historical rates, would deserve a multiplier of 2.6, just to compensate for interest alone. Thus the proscription of multipliers is not very equitable justice.

In my experience auditing all kinds of fee cases, the courts currently are very stingy with their compensation. Generally, the client never gets compensated up to the level the lawyer has billed, where the case was not purely contingent, and the lawyer never gets fully compensated in contingent cases.

Section (e) would substitute the "lodestar", or lazy man's approach to fee computation. See, e.g, Copeland v Marshall, 641 F2d 880 (1980). The trouble with "lodestar" is that it is so artificial that it loses all touch with reality. Thus courts are tempted beyond reason to make sloppy awards. Congress should expect trouble if the award standard is converted to the "lodestar" method.

Section (e) also abandons the recently-decided method of awarding "mixed" cases (where some issues won and some lost). It would substitute an extremely difficult method to apply in practice, and thereby would escalate the cost of the award itself.

Ruiz v Estelle, probably the most thorough decision pertaining to fee awards, discussed from 576 to 582 of 553 F Supp how difficult and impractical most separation attempts become. Hensley agreed, saying:

> "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the result obtained."

This standard is, of course, the standard of DR2-106.

To show that fee awards may become monsters, if the accounting is overdone such as proposed in section (e), one need only consult Ruiz, or Copeland . A recent adjudication, Lion Uniform v N.L.R.B, 10-CA-12938 et al (1983), has computed an award of $96,904.45 for the work on the case-in-chief. But due to the defendant's investigative posture concerning the fee award, the computed additional award for the fee-award litigation itself, to date (there may be more), was $90,564.65 . In other words, litigating the fee award almost surpassed litigating the case-in-chief!

I believe Congress should not encourage lengthy disputes over fee awards by trying to "atomize" the issues such as proposed in section (e). I urge this Committee to reject it.

Section 722A(f)

Currently, a fee request must be reasonable, complete, and submitted within a reasonable time. See, e.g, S. Rep 94-1011; Johnson ; White v N.H. Section (f) will respecify all these criteria, thereby upsetting current court procedures. The result will be more disputes over details.

A particularly difficult problem will arise if a "30-day" timing requirement is imposed. This requirement was imposed for part of EAJA, P.L. 96-481, and caused much mayhem there. A 30-day requirement does not provide enough time to get invoices back from 30-day charge accounts, without overtime and other premium charges. Moreover, the United States is so vast, as it was decided when P.L.98-72 was enacted (S.272), that an extra 15 days is necessary to provide the minimal cushion to allow for mailing back and forth. Furthermore, the exact moment when "final judgment" occurs is not ordinarily obvious to the litigants in every action. Therefore, the time when the "window" opens is not very predictable. To submit data too early will penalize the parties; to gather it too late may invalidate the award. In the context of a civil-rights action, such treatment of a victor would be unthinkable.

The method worked out by the courts is superior to the proposed change set forth in section (f), and the court's method is now understood by the litigants. I urge this Committee to reject the proposed section (f).

Amendment to S.141 Sec.2

As an alternative to section 2, I respectfully suggest the following language, to be added to section 722 of the Revised Statutes. The language will minimize litigation:

> "To receive an award of litigation expenses under this section, prior to filing suit a prevailing plaintiff must have given notice of the alleged injury to the losing party, and a suitable time thereafter, to enable the losing party to effect a cure thereof, must have elapsed before the suit was filed, or else the fee award may be adjusted to compensate therefor at the discretion of the court.
>
> "No party shall be liable for that portion of the litigation expenses which the court decides is not reasonable."

CONCLUSION

I am sorry that I cannot be present to answer questions in Washington September 27, but I will gladly answer correspondence at your pleasure. However, I believe it would be best if the Committee reports S.81 & S.141 without a "pass" recommendation at this time.

Mc Quiston Associates
1035 North Orange Drive
Los Angeles, California 90038
(213) 464-6792; 463-1040